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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

MODESTO OZUNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court granted Petitioner's motion to suppress evidence found during a search of his vehicle, holding that Petitioner did not consent to the search. The government moved to reopen the suppression hearing in order to introduce expert handwriting analysis claiming that Petitioner signed a form consenting to the search. Although the government could have introduced handwriting analysis at the initial suppression hearing, the district court reopened the hearing to admit the handwriting analysis, vacated its prior decision, and found the evidence discovered in Petitioner's vehicle admissible. The Seventh Circuit affirmed. Expressly rejecting decisions from several other circuits, it held that the government was not required to justify its failure to introduce handwriting analysis at the initial suppression hearing.

The question presented is whether a litigant moving to reopen a suppression hearing in order to introduce additional evidence must justify its failure to introduce that evidence at the initial hearing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Modesto Ozuna respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion (App., *infra*, 1a–22a) is reported at 561 F.3d 728. The district court's order and oral opinion granting the motion to suppress (App., *infra*, 31a–38a) and the court's order and oral opinion vacating its grant of the motion to suppress and denying suppression (App., *infra*, 39a–50a) are unreported. The district court's judgment (App., *infra*, 23a–30a) is also unreported.

JURISDICTION

The Seventh Circuit entered judgment on April 6, 2009. Justice Stevens extended the time for a writ of certiorari until September 3, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

In July 2003, an agent of the Drug Enforcement Agency ("DEA") based in Texas informed DEA agents in Chicago that a confidential informant had provided information about a plan to transport cocaine from Texas to the Chicago area in a tractor-trailer registered to "Ozuna's Express." App., *infra*, 2a. On July 28, Chicago DEA agents identified a tractor-trailer bearing the name "Ozuna's Express" and stopped the vehicle. *Id.* The agents searched the trailer, found 200 kilograms of cocaine, and arrested the driver—Modesto Ozuna. *Id.* Ozuna was subsequently indicted for possession with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1). *Id.*

A. The District Court Suppressed Evidence Found During The Search Because Ozuna Did Not Provide Consent.

Ozuna moved to suppress the cocaine found in his vehicle, arguing (among other things) that he did not consent to the search. C.A. App., Tab 21 at 14–15. On March 2, 2005, United States District Judge John F. Grady held a hearing on Ozuna's motion. At that hearing, the government produced a single witness: DEA Special Agent Robert Glynn, one of the agents involved in Ozuna's arrest.

Agent Glynn testified that he pulled Ozuna's vehicle over to the side of the road while a second DEA agent parked his car directly in front of Ozuna's vehicle. C.A. App., Tr. Vol. 1 at 17–18. Glynn claimed that he neither handcuffed Ozuna after Ozuna exited the vehicle nor drew his weapon at any time during the encounter. *Id.* at 21, 56–58. Admittedly lacking probable cause to arrest Ozuna, Glynn purportedly

informed Ozuna that "he was not under arrest, that he was free to go, and that he did not do anything wrong." *Id.* at 19, 51. Glynn testified that Ozuna nevertheless both orally consented to the search of his vehicle and signed a form consenting to the search. *Id.* at 22–23. Because a padlock protected the trailer, Glynn "allowed [Ozuna] to go up in the truck and grab the key" and unlock the padlock, even though Glynn admittedly had not searched the truck for weapons. *Id.* at 22, 25, 60–61. DEA agents then found cocaine in the trailer and placed Ozuna under arrest. *Id.* at 25, 28.

Ozuna testified in support of his motion. He stated that he had been hired to drive a tractor-trailer loaded with limes and mangoes from Texas to the Chicago area. C.A. App., Tr. Vol. 1 at 71. Ozuna explained that the DEA agents cut his vehicle off the road, pointed a shotgun at his head, told him to "'[g]et the f*** out of the truck," and handcuffed him. *Id.* at 73–76. He testified that he rejected the agents' oral request to consent to a search of his vehicle, did not sign any form consenting to such a search, and did not provide the agents with the key to the trailer's padlock. *Id.* at 77–78, 82. Instead, Ozuna heard a "bang" coming from the trailer, saw its doors swing open, and later saw that the padlock had been broken. *Id.* at 83–84.

After hearing the testimony of Glynn and Ozuna, the district court granted Ozuna's motion to suppress. App., *infra*, 38a. The court observed in an oral ruling that the search was conducted "without a search warrant," and that "nobody says there was any probable cause to search the truck." *Id.* at 31a, 37a. Therefore, "[t]he search was either consented to or it was invalid." *Id.* at 37a.

In finding that Ozuna did not consent to the search, the court recognized that the DEA agents may well have "perceived Ozuna to be a threat." App., *infra*, 35a. It explained that "[t]his is not a traffic stop of an ordinary citizen who's exceeding the speed limit. This is a stop of a potentially dangerous and potentially murderous criminal." *Id.* at 36a. The court therefore expressed doubt about Agent Glynn's testimony that the DEA agents did not draw their weapons and allowed Ozuna to retrieve the key to the trailer padlock without having "the slightest idea what's inside the cab of that truck, whether there's a shotgun in there or a handgun or any other kind of weapon that the driver of the truck could turn on them and kill or injure them." *Id.* at 35a. "The idea that the agents would let [Ozuna] get up into the cab without their being there and before they searched the cab for the purpose of getting a key, doesn't make any more sense to me than the proposition that they would not have prepared to meet violence with violence at the time they made the stop of this person who was suspected of being the repeated hauler of enormous quantities of illegal drugs." *Id.* at 36a.

Turning to the consent-to-search form purportedly signed by Ozuna, the court compared the signature on that form to several documents containing Ozuna's known signature. While acknowledging that "we sign our name a different way every time," the court found that the signature on the consent-to-search form "looks different to me than the signatures on the other * * * documents." App., *infra*, 35a, 36a. The court concluded that the differences between the signature on the consent-to-search form and Ozuna's known signature were "too great" to find that Ozuna had signed the form. *Id.* at 36a. Accordingly, while expressing disbelief with certain as-

pects of Ozuna's testimony, the court held that the government had failed to prove by a preponderance of the evidence that Ozuna voluntarily consented to the search and therefore excluded the cocaine found in the trailer. *Id.* at 37a.

B. The District Court Reopened The Suppression Hearing, Vacated Its Original Order, And Denied The Motion To Suppress.

On March 14, 2005, the government moved to reconsider the district court's suppression order or, alternatively, to reopen the suppression hearing in order to introduce expert handwriting analysis about the signature on the consent-to-search form. C.A. App., Tab 27. In its motion, the government made no effort to justify its failure to introduce the handwriting analysis at the initial suppression hearing. Instead, the government argued that evidence that is not "'newly discovered'" may be admitted at a successive hearing, and that the handwriting analysis "had a direct bearing on the credibility of both witnesses who testified at the suppression hearing." *Id.* at 17.

The district court denied the government's motion to reconsider. C.A. App., Tab 33. However, without issuing an order resolving the government's motion to reopen, the court set a hearing to admit additional testimony regarding the motion to suppress and authorized Ozuna to hire a handwriting expert. C.A. App., Tabs 34, 37. The reopening of the suppression hearing spawned significant satellite litigation: the parties' experts authored reports opining about the authenticity of the signature on the consent-to-search form followed by three separate hearings to introduce the experts' testimony and provide oral argument about that testimony.

At a hearing held on June 14, 2005, Ozuna introduced testimony by his court-appointed handwriting expert, Ellen Schuetzner. Schuetzner testified that although there were "indications" that Ozuna may have signed the form—which she described as a "very weak opinion of authorship"—there were several inconsistencies that could indicate forgery. C.A. App., Tr. Vol. 2 at 42, 61, 70. For example, unlike the twenty-two known Ozuna signatures that Schuetzner reviewed, the signature on the consent-to-search form misspelled Ozuna's first name. *Id.* at 35. Schuetzner also observed that three different pens were used on the form (*id.* at 19–20), consistent with Ozuna's claim of forgery. Finally, Schuetzner testified that the government's use of a solvent to test the consent-to-search form for fingerprints—a test that did not detect Ozuna's fingerprints—damaged the form for purposes of conducting handwriting analysis and prevented her from determining whether the signature was forged. *Id.* at 18, 25. The court observed that the government's degradation of the consent-to-search form "strikes me as coming pretty close to spoliation." *Id.* at 28.

At a subsequent hearing held on June 23, 2005, the government introduced testimony from its handwriting expert, James Regent. Regent testified that he had the "highest degree of confidence" that Ozuna signed the consent-to-search form. C.A. App., Tr. Vol. 3 at 32. In doing so, however, Regent admitted that the signature on the consent-to-search form differed from Ozuna's known signature in numerous respects. *Id.* at 66.

On June 24, 2005, the district court held yet another hearing during which the parties provided argument and the court issued an oral ruling vacat-

ing its prior order and denying Ozuna's motion to suppress. The court explained that it did "not give any weight * * * to the government's expert when he said he believes this is the defendant's signature" on the consent-to-search form. App., *infra*, 40a. Instead, the court found the handwriting analysts' testimony helpful "in coming to [its] own conclusion," after comparing the consent-to-search form with Ozuna's known signature, that Ozuna had in fact signed the form. *Id.* The court thus rejected Ozuna's assertion that his signature had been forged, reasoning in part that "it does not make sense to me that someone who was going to * * * attempt a forgery * * * would leave off * * * the O from Modesto" and "put two Ss in Modesto." *Id.* at 45a, 46a. Finally, the court held that the DEA agents' stop of Ozuna's vehicle did not ripen into an arrest before Ozuna provided consent, concluding that "this is a close case," but finding "by the bare preponderance of the evidence that this was not an arrest but rather a *Terry* stop followed by a voluntary consent to search." *Id.* at 48a.[1]

Ozuna's first trial was held in August 2006. The district court declared a mistrial because the jury was unable to reach a unanimous verdict. App., *infra*, 6a–7a. After a second trial held in November 2006, a jury found Ozuna guilty. *Id.* at 7a–8a. The

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[1] Ozuna subsequently moved for reconsideration of the district court's denial of his motion to suppress or, alternatively, to reopen the suppression hearing in order to introduce evidence indicating that—contrary to Agent Glynn's testimony—the padlock on the trailer door was broken during the search. C.A. App., Tab 56. The district court denied the motion to reconsider but held two hearings to admit additional evidence before ultimately adhering to its denial of the motion to suppress. C.A. App., Tr. Vols. 5–6, C.A. App., Tab 67.

district court sentenced Ozuna to twenty-five years imprisonment. *Id.* at 25a.

C. The Seventh Circuit Expressly Acknowledged A Deep Circuit Split In Affirming Ozuna's Conviction.

The Seventh Circuit, per Judge Kanne, affirmed Ozuna's conviction. In doing so, the court rejected Ozuna's argument that "the district court erred in reopening the suppression hearing and allowing the government to present new evidence"—Regent's handwriting analysis—"that was available to it at the time of the original hearing." App., *infra*, 9a. The court "decline[d] to impose" a requirement that the party moving to reopen a suppression hearing in order to introduce additional evidence "justify" its failure to introduce that evidence at the initial hearing. *Id.* at 10a.

The Seventh Circuit expressly acknowledged, however, that "[s]everal of our sister circuits have * * * adopted rules requiring the government to justify reconsidering, reopening, or supplementing suppression hearings." App., *infra*, 11a. The Seventh Circuit rejected the "bright-line rule" followed by these courts, instead adopting a "'totality of the circumstances'" approach that "leav[es] the matter to the district court's discretion." *Id.* at 12a. The court explained that its "flexible approach" better "protects society's interest" in admitting "all relevant, constitutionally obtained evidence," while allowing district judges "to refuse to reopen the suppression hearing or to decline to consider the government's evidence if the government is wasting judicial resources or proceeding in a way that is unfair to the defendant." *Id.*

The Seventh Circuit went on to hold that the district court did not abuse its discretion by reopening the suppression hearing. It reasoned that the handwriting analysis helped the district court to determine "whose version of the search to believe, resulting in a more accurate ruling"; that there was "no evidence that the government was engaged in a deliberate strategy to proceed in a piecemeal fashion"; and that "Ozuna has not convinced us that he was harmed in any way by the fact that the handwriting testimony was presented at the second, rather than the first suppression hearing." App., *infra*, 13a–14a. The court also rejected Ozuna's remaining arguments and therefore affirmed.

Ozuna filed a motion asking the Seventh Circuit to appoint counsel to file a petition for certiorari on his behalf. The Seventh Circuit granted Ozuna's motion and, acting pursuant to the Criminal Justice Act, appointed the undersigned counsel to file a petition for certiorari.

REASONS FOR GRANTING THE PETITION

There are three principal reasons why the Court should grant this petition. First, the courts of appeals are deeply divided with respect to whether a litigant moving to reopen a suppression hearing must justify its failure to produce the evidence forming the basis for the motion at the initial hearing. Five circuits have held that the moving party must provide justification, while three—including the Seventh Circuit in this case—have held that justification is unnecessary. The Court should resolve this longstanding circuit split to provide guidance to the lower courts and create uniformity in the law.

Second, this case presents an ideal vehicle to resolve a recurring question that is of substantial importance. Like the government here, disappointed litigants routinely move to reopen suppression hearings in order to introduce additional evidence. The resulting successive suppression hearings to hear evidence that could have been introduced at the initial hearing impair important societal interests in prompt criminal proceedings and in the conservation of scarce judicial resources. Moreover, the Seventh Circuit did not state an alternative holding or identify any other factor that might prevent the Court from resolving the question presented.

Third, the Seventh Circuit's decision is incorrect. The bright-line rule adopted by the majority of circuits requiring justification to reopen suppression hearings promotes predictability, finality, and the prompt adjudication of motions to suppress by placing litigants on notice that they must introduce all relevant, available evidence at the initial hearing. By contrast, the Seventh Circuit's malleable "totality of the circumstances" approach delays resolution of pretrial proceedings; needlessly expends judicial resources to hold successive hearings; encourages the piecemeal introduction of evidence; and threatens to overwhelm defendants with the government's superior resources. Finally, the Seventh Circuit's decision is inconsistent with this Court's conclusion under analogous facts that litigants must provide justification in order to introduce untimely evidence.

I. THE SEVENTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH DECISIONS FROM FIVE OTHER COURTS OF APPEALS.

In holding that district courts may reopen suppression hearings in order to admit additional evidence without requiring the moving party to justify its failure to produce that evidence at the initial hearing, the Seventh Circuit observed that the Second and Ninth Circuits have reached the same conclusion. App., *infra*, 10a (citing *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 196–97 (2d Cir. 2008) ("we now hold that, on a motion to reopen a suppression hearing, there is no bright-line rule that necessarily and invariably requires the government to provide a reasonable justification for its failure to offer relevant evidence at an earlier suppression proceeding"); *United States* v. *Rabb*, 752 F.2d 1320, 1322–23 (9th Cir. 1984) ("the district court may reconsider its suppression order" without requiring movant to provide "justification" for its failure to make new argument to admit evidence at initial hearing), abrogated on other grounds by *Bourjaily* v. *United States*, 483 U.S. 171 (1987)).

The Seventh Circuit expressly acknowledged, however, that "[s]everal of our sister circuits" have reached the contrary conclusion, "requiring the government to justify reconsidering, reopening, or supplementing suppression hearings." App., *infra*, 11a. Other circuits have likewise recognized that courts of appeals have taken "two approaches" to resolving motions for reopening based on evidence that was available at the time of the initial suppression hearing. *United States* v. *Bayless*, 201 F.3d 116, 131 (2d Cir. 2000); see *Rabb*, 752 F.2d at 1323 ("[w]e reject

[the D.C. Circuit's] 'justification' requirement"); see also *United States* v. *Flores-Ortega*, 2006 WL 3041372, at *2 (D. Utah Oct. 24, 2006) ("There is a split of authority on whether, when it moves for reconsideration * * * , the government must 'proffer a justification for its failure to present the relevant evidence at the original suppression hearing'"); *United States* v. *Watson*, 391 F. Supp. 2d 89, 91–92 (D.D.C. 2005) ("The courts of appeals have articulated various approaches to assessing a motion to reopen a suppression hearing").

Indeed, five courts of appeals have held, contrary to the Second, Seventh, and Ninth Circuits, that a party moving to reconsider a suppression order or to reopen a suppression hearing must justify its failure to produce the evidence forming the basis for the motion at the original hearing:

• In *United States* v. *Kithcart*, 218 F.3d 213 (3d Cir. 2000), the district court reopened a suppression hearing to allow the government to introduce testimony that the car in which the defendant was a passenger had run a red light, providing police with reasonable suspicion to conduct a *Terry* search. The Third Circuit reversed, holding that the district court erred in reopening the suppression hearing because "no explanation was even offered by the government" for its failure to introduce testimony that the car had run a red light at the initial hearing. *Id.* at 220. The court stated that "to properly exercise its discretion, the district court *must* evaluate [the government's] explanation and determine if it is both reasonable, and adequate to explain why the government initially failed to introduce evidence that may have been essential to meeting its burden of proof." *Id.* (empha-

sis added); accord *United States* v. *Coward*, 296 F.3d 176, 181–82 (3d Cir. 2002).

• In *United States* v. *Dickerson*, 166 F.3d 667 (4th Cir. 1999), rev'd on other grounds, 530 U.S. 428 (2000), the district court suppressed the defendant's confession, rejecting an FBI agent's testimony that the defendant waived his *Miranda* rights before confessing. The district court denied the government's motion to reconsider based on testimony from two other FBI agents who "corroborated" the first agent's "testimony concerning when [defendant] was read his *Miranda* warnings" because this evidence "was available at the time of the suppression hearing." *Id.* at 678. The Fourth Circuit affirmed in relevant part, explaining that "when the evidence forming the basis for a party's motion for reconsideration was in the movant's possession at the time of the initial hearing, * * * the movant *must* provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress." *Id.* at 679 (emphasis added). The court concluded that the government's proffered justifications for failing to introduce the additional agents' testimony at the initial hearing—that "it never believed that the district court would find [defendant] more believable" than the first agent and "did not want to burden the district court with cumulative evidence"—were insufficient. *Id.* at 678–80.

• In *United States* v. *Carter*, 374 F.3d 399 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005), the Sixth Circuit affirmed the district court's denial of the defendant's motion to reopen a suppression hearing in order to ask additional questions of a government witness and to call a new witness. Agreeing with the Third Circuit's decision in *Kith-*

cart that "[t]he party moving to reopen should provide a reasonable explanation for failure to present the evidence" at the initial suppression hearing, the Sixth Circuit held that the district court did not abuse its discretion because "Defendant presented no explanation * * * about why he failed to present the evidence initially." *Id.* at 406.

• In *United States* v. *Thompson*, 710 F.2d 1500, 1503 (11th Cir. 1983), the district court suppressed evidence found during a warrantless search, rejecting the government's argument that the search "was permissible as part of an authorized document and safety inspection." The district court denied the government's motion to reconsider based on its new argument that reasonable suspicion existed to conduct the search. The Eleventh Circuit affirmed, holding that "the government waived its right to raise the reasonable suspicion issue * * * by failing to raise the issue at the [initial] suppression hearing without offering any justification therefor." *Id.* at 1504; accord *United States* v. *Villabona-Garnica*, 63 F.3d 1051, 1055 (11th Cir. 1995) ("This Circuit has held that when the government moves to reconsider a suppression motion previously granted, it *must* provide a justification for that motion") (emphasis added).

• In *McRae* v. *United States*, 420 F.2d 1283 (D.C. Cir. 1969), the district court suppressed evidence discovered during a warrantless search. A second district judge granted the government's motion to reopen, heard additional testimony, and ruled that the evidence was admissible. The D.C. Circuit reversed, holding that the district court erred by reopening the suppression hearing without requiring "justification for relitigating the issue." *Id.* at 1288. The court explained that if "the Government wished

to develop new facts * * * , we feel that the prosecutor bore some responsibility to suggest to the Court why these facts had not been elicited at the first hearing." *Id.* at 1289; accord *United States* v. *Greely*, 425 F.2d 592, 593 (D.C. Cir. 1970) ("The government *cannot* relitigate the issues resolved by a suppression order without advancing some justification for its failure to develop those issues fully at the initial hearing") (emphasis added).

Thus, as the court below recognized, the question presented here raises an issue that has deeply divided the courts of appeals. Five circuits have adopted the position advanced by Ozuna, while three—including the Seventh Circuit in this case—have held to the contrary. This deep circuit split has percolated long enough: the Court should grant this petition to resolve the question presented and create uniformity in the lower courts.

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE A RECURRING ISSUE THAT IS OF SUBSTANTIAL IMPORTANCE.

As the numerous courts of appeals' decisions discussed above demonstrate, the issue of whether to reopen suppression hearings recurs with substantial frequency. Indeed, Westlaw is littered with decisions addressing motions to reopen suppression hearings,[2]

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[2] *E.g.*, *United States* v. *Chanley*, 2009 WL 2447983 (D. Nev. Aug. 10, 2009); *United States* v. *Banks*, 2009 WL 585506 (E.D. Tex. Mar. 6, 2009); *United States* v. *Valentine*, 591 F. Supp. 2d 238 (E.D.N.Y. 2008); *United States* v. *Matos*, 2008 WL 5169112 (E.D.N.Y. Dec. 8, 2008); *United States* v. *Martinez*, 2008 WL 4982263 (E.D. Tenn. Nov. 19, 2008); *United States* v. *Goncalves*, 2008 WL 4238707 (N.D.N.Y. Sept. 5, 2008); *United States* v. *Angelov*, 2008 WL 5004311 (S.D. Fla. July 9, 2008); *United States* v. *Pena Ontiveros*, 2008 WL 2446824 (S.D.N.Y. June 16,

with no doubt many more courts—like the district court in this case—resolving such motions in unreported decisions. Because motions to reopen based on evidence available at the time of the initial suppression hearing are commonplace, this Court's resolution of the question presented would have wide applicability beyond the particular facts of this case.

The question presented is also of substantial importance. This Court has recognized a "compelling interest in prompt trials" of criminal defendants. *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984). "As the Sixth Amendment's guarantee of a Speedy Trial indicates, the accused may have a strong interest in speedy resolution of the charges against him." *Id.* at 264. "In addition, 'there is a societal interest in providing a speedy trial,'" for "[a]s time passes, the prosecution's ability to meet its burden of proof may greatly diminish: evidence and witnesses may disappear, and testimony becomes more easily impeachable as the events recounted become more remote." *Id.* "Delay increases the cost of pretrial detention and extends 'the period during which defendants released on bail may commit other crimes.'" *Id.*

The Seventh Circuit's decision will prolong criminal pre-trial proceedings. Absent a strict requirement that a party moving to reopen justify its failure to introduce the evidence forming the basis for the motion at the initial suppression hearing, the lax "totality of the circumstances" approach adopted by the Seventh Circuit increases the likelihood that district courts will hold successive hearings. Many district

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2008); *United States* v. *Dennis*, 2008 WL 2381549 (E.D. Pa. June 10, 2008); *United States* v. *Jarnigan*, 2008 WL 1848902 (E.D. Tenn. Apr. 24, 2008); *United States* v. *Valle-Sierra*, 2008 WL 94805 (D. Colo. Jan. 7, 2008).

judges, wary of reversal, would reopen suppression hearings to admit evidence of dubious relevance that should have been introduced at the initial hearing. Moreover, without a justification requirement, some litigants may seek to game the system by introducing evidence piecemeal, confident that district judges would be unlikely to refuse to hold successive hearings to consider clearly relevant evidence.

The successive suppression hearings likely to follow from the Seventh Circuit's approach necessitates the expenditure of additional judicial resources. The federal caseload has "grown enormously over a generation," which "means unnecessary delay and consequent added cost." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 111 (1998) (Breyer, J., concurring). Since *Steel* was decided, the federal caseload has continued to grow dramatically. Pending federal criminal cases have increased over 71% since 1999 to more than 73,000, with criminal cases per authorized judgeship growing to 105. Administrative Office of the United States Courts, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 13, 19 (2009). The Seventh Circuit's approach incentivizes district judges to hold successive suppression hearings, needlessly expending judicial resources and exacerbating the already lengthy backlog of criminal cases in the district courts.

This case illustrates the unnecessary delay caused by the Seventh Circuit's approach. Following the district court's initial decision granting Ozuna's motion to suppress on March 2, 2005, the parties: (a) briefed the government's motion to reconsider the suppression order or reopen the suppression hearing; (b) produced expert handwriting reports; (c) participated in two hearings to take testimony from the ex-

perts; and (d) presented oral argument at a third hearing, culminating in the district court's order denying suppression on June 24, 2005. That lengthy delay and concomitant expenditure of judicial and party resources would not have occurred under the bright-line rule adopted by the majority of circuits because the government did not provide the district court with any justification for its failure to offer handwriting analysis at the initial suppression hearing.

Finally, this case presents an ideal vehicle to resolve the question presented. The Seventh Circuit did not state an alternative holding that would make this Court's review of the question presented irrelevant to the disposition of this case. *Cf. In re Terrorist Bombings*, 552 F.3d at 197 ("Even if we were to impose a 'justification' requirement, the government surely met it here"). Accordingly, if this Court adopted the majority view and required justification to reopen a suppression hearing, then reversal of the Seventh Circuit's decision would necessarily follow.[3]

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[3] After rejecting a bright-line rule requiring justification, the Seventh Circuit discussed several factors in concluding that the district court did not abuse its discretion by reopening the suppression hearing. In finding no basis to conclude that the government intentionally introduced evidence "piecemeal," the court noted that "[i]t does not appear" that the authenticity of the signature on the consent-to-search form "was clearly at issue until the first suppression hearing. App., *infra*, 13a. In fact, Ozuna made clear in moving to suppress that his consent was at issue. C.A. App., Tab 21 at 14–15. But even if the Seventh Circuit's remark were correct, the court did not suggest that it would suffice to provide justification under the bright-line rule.

III. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT.

The Seventh Circuit based its decision on its view that a "flexible approach" that considers "'the totality of the circumstances'" is superior to a "bright-line rule" that bars reopening absent justification for the moving party's failure to introduce the evidence that forms the basis for the motion to reopen at the initial suppression hearing. App., *infra*, 12a. The court reasoned that its approach better "protects society's interest in ensuring a complete proceeding where the court considers all relevant, constitutionally obtained evidence." *Id.* Moreover, the district court "remains free to refuse to reopen the suppression hearing or to decline to consider the government's evidence if the government is wasting judicial resources or proceeding in a way that is unfair to the defendant." *Id.*

1. The Seventh Circuit erred in concluding that its approach better protects society's interest in admitting all relevant evidence. The bright-line rule adopted by the majority of circuits places litigants on notice that they must produce all relevant evidence at the initial suppression hearing. By making clear that a suppression order is final absent justification for introducing additional evidence, the bright-line rule discourages litigants from withholding evidence at the initial hearing and thus increases the likelihood that all relevant evidence will be admitted. In contrast, the totality of the circumstances approach encourages litigants to introduce evidence piecemeal, confident that they will be permitted to introduce additional evidence at a second hearing should the first not go their way. If, however, that confidence proves misplaced and the district court denies reo-

pening—as it may under the malleable totality of the circumstances approach—then "relevant, constitutionally obtained evidence" could be excluded. App., *infra*, 12a.

But even if the Seventh Circuit's approach better protected society's interest in admitting all relevant evidence, that interest "is not unlimited" and may "'bow to accommodate other legitimate interests in the criminal trial process.'" *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998). As we demonstrate *supra* at 17–18, the bright-line rule reduces delay in criminal proceedings and conserves judicial resources. The bright-line rule also promotes "finality in criminal litigation" and discourages "sandbagging" through piecemeal introduction of evidence at successive hearings. *Wainwright* v. *Sykes*, 433 U.S. 72, 88–89 (1977) (requiring habeas petitioner to demonstrate, *inter alia*, "cause" for failure to comply with state contemporaneous objection rule); *cf. Puckett* v. *United States*, 129 S. Ct. 1423, 1431 (2009) (rule requiring contemporaneous objection at sentencing hearing prevents defendant from "'gam[ing]' the system, 'wait[ing] to see if the sentence later str[ikes] him as satisfactory,' and then seeking a second bite at the apple by raising the claim") (internal citation omitted). Discouraging the piecemeal introduction of evidence is particularly critical in criminal proceedings, where the government's greater resources can swamp those of defendants. These considerations far outweigh any interest advanced by the totality of the circumstances approach.

It is no answer to suggest, as did the Seventh Circuit, that district courts can ferret out instances where litigants make strategic decisions to withhold evidence at the initial suppression hearing. App., *in-*

fra, 12a. District judges are not mind readers. Without requiring the moving party to justify its failure to introduce evidence at the initial hearing, district judges generally have no way of knowing whether the moving party made a strategic decision to withhold evidence.

2. The Seventh Circuit's rejection of a justification requirement is also contrary to analogous legal doctrines that require justification. Because the Federal Rules of Criminal Procedure do not directly address motions to reopen suppression hearings, courts have looked to rules governing similar circumstances in setting forth standards for resolving such motions. *See, e.g.*, Fed. R. Crim. P. 12(e) (untimely motions to suppress are waived absent "good cause"); Fed. R. Crim. P. 33(b)(1) (governing motions for new trial based on "newly discovered evidence"); Fed. R. Civ. P. 60(b)(2) (movant seeking to obtain relief from civil judgment based on "newly discovered evidence" must show that it exercised "reasonable diligence" in seeking evidence before judgment was entered). Most commonly, courts have held that "[a] ruling on whether to reopen a suppression hearing is governed by principles of jurisprudence that relate to reopening proceedings, generally." *Carter*, 374 F.3d at 405.

Under this Court's decisions addressing motions to reopen criminal trials in order to introduce additional evidence, the Seventh Circuit's rejection of a justification requirement is incorrect. In *United States* v. *Bayer*, 331 U.S. 532, 537 (1947), for example, four hours after submission of the case to the jury the defendants sought to introduce evidence that "tended to corroborate" one of their witnesses. Assuming that "the proffered evidence was relevant [and] corroborative of the [defendants'] contentions,"

this Court nevertheless held that the district court did not err by refusing to reopen the trial. *Id.* The Court explained in part that the evidence was "well known" to exist before the trial began, that "it should have been apparent that every bolster to [the witness's] credibility would be important," and that the defendants offered "*no excuse* for the untimeliness of the offer." *Id.* at 538–39 (emphasis added).

The Seventh Circuit's rejection of a justification requirement is also at odds with this Court's precedent holding that arguments not timely made at a suppression hearing are waived. In *Steagald* v. *United States*, 451 U.S. 204 (1981), the district court denied the defendant's motion to suppress evidence found during a warrantless search of a residence, holding that an arrest warrant for a third person believed to be living at the residence justified the search. In this Court, the government sought a remand to the district court to resolve its new argument that the defendant lacked a reasonable expectation of privacy in the residence. This Court rejected the government's request, stating that the government "may lose its right to raise factual issues of this sort * * * when it has failed to raise such questions in a timely fashion during the litigation." *Id.* at 209. In doing so, the Court observed that the government provided "no explanation" for its failure to argue that the defendant lacked a reasonable expectation of privacy in the residence during the suppression hearing. *Id.* at 210 n.5; see also *Giordenello* v. *United States*, 357 U.S. 480, 488 (1958) (declining to remand with instructions that district court hold hearing to determine validity of government's new argument for upholding legality of arrest, not made in opposing motion to suppress, because facts upon which gov-

ernment based its new argument "were fully known to it at the time of trial").

Similarly, in this case, Ozuna's motion to suppress made clear his position that he did not consent to the search of his vehicle. Yet the government failed to introduce handwriting analysis of the consent-to-search form at the initial hearing and provided the district court with "no explanation" for its failure to do so. *Steagald*, 451 U.S. at 210 n.5. As in *Steagald*, the government therefore "los[t] its right" to produce handwriting analysis at a successive hearing. *Id.* at 209. The Seventh Circuit erred in holding otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2009

APPENDIX A

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE, v. MODESTO OZUNA, DEFENDANT-APPELLANT.

No. 07-2480.

Argued Dec. 10, 2008.
Decided April 6, 2009.

Before POSNER, KANNE, and ROVNER, Circuit Judges

KANNE, Circuit Judge

On July 28, 2003, agents of the Drug Enforcement Agency stopped a tractor-trailer driven by Modesto Ozuna. After searching the trailer, allegedly pursuant to Ozuna's consent, the agents found 200 kilograms of cocaine. Ozuna was later arrested and indicted for possession with the intent to distribute more than five kilograms of cocaine. The district court initially suppressed the evidence from the search because the government had failed to prove by a preponderance of the evidence that Ozuna consented to the search. It later reopened the suppression hearing to consider the testimony of two handwriting experts regarding whether a signature on the consent form belonged to Ozuna. Based on this new evidence, the court vacated its prior order and found the evidence admissible. Ozuna appeals the district court's decision to reopen the suppression

hearing and its reliance on the government's handwriting expert. He also appeals the district court's decision to exclude certain testimony he wished to present at trial. We now affirm.

I. BACKGROUND

In July 2003, Agent Michael Lumpkin of the Drug Enforcement Agency informed DEA agents in Chicago that two drug distributors, Claudio Aguilar and Mario Garcia, were orchestrating a drug exchange in the Chicago area using a tractor-trailer registered to "Ozuna's Express." On July 28, the Chicago agents pulled over Modesto Ozuna, who was driving a tractor-trailer bearing the name "Ozuna's Express." A search of the trailer, purportedly pursuant to Ozuna's consent, revealed 200 kilograms of cocaine hidden among a load of limes.

Ozuna was taken to a DEA office, where, according to agents, he admitted that he was transporting illegal drugs. Ozuna told the agents that he wished to cooperate against Aguilar, so he was allowed to return to Texas for that purpose. Ozuna was released but was arrested again in August 2004. He was subsequently indicted for possession with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1).

During the proceedings that followed, the government and Ozuna recited different versions of the events surrounding Ozuna's apprehension and arrest. Disagreement regarding these facts led to a number of evidentiary challenges that have become the subject of this appeal.

A. Ozuna's Motions to Suppress the Seized Cocaine

On January 12, 2005, Ozuna filed a motion to suppress the 200 kilograms of cocaine seized from his vehicle, arguing that he did not consent to the trailer's search.[1] On March 2, 2005, the court held a suppression hearing, at which DEA Special Agent Robert Glynn and Ozuna both testified as to their recollections of the search on July 28, 2003.

Glynn testified that, pursuant to information received from Lumpkin, he and other agents began surveillance of Aguilar and Garcia at O'Hare airport. Agents watched Aguilar and Garcia drive to a hotel, where they also saw Ozuna, who was driving a tractor-trailer. Based upon what they witnessed and information received from Agent Lumpkin, the agents stopped Ozuna's tractor-trailer.

Glynn and Task Force Officer William McKenna approached the driver's door of the vehicle. According to Glynn, he asked for Ozuna's consent to search the trailer, and Ozuna agreed. Ozuna told the agents that the trailer was locked, and Glynn permitted him to retrieve the key from the cab. Ozuna then unlocked the trailer door.

Glynn testified that he retrieved a DEA consent-to-search form from his car and read it to Ozuna. Ozuna signed the form, which Glynn and McKenna also signed as witnesses. The agents searched the trailer and discovered the cocaine. They then took Ozuna to the DEA office in Chicago.

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[1] Ozuna also argued that the agents lacked reasonable suspicion to stop the tractor-trailer and that his stop resulted in an arrest without probable cause, but only the question of his consent is relevant to this appeal.

Ozuna disputed much of Glynn's testimony. He stated that on July 28, he drove a tractor-trailer loaded with mangoes and limes from Texas to Chicago. He claimed that the agents cut him off while he was driving, pointed a weapon at his head, demanded that the exit the truck, and handcuffed him. Ozuna maintained that he never gave the agents consent to search the tractor-trailer, did not retrieve the keys from the tractor or unlock the trailer, and did not sign the consent-to-search form. He denied knowledge of the cocaine found in the trailer.

At the close of the suppression hearing, the district court granted Ozuna's motion to suppress. After ruling that the DEA was justified in stopping the tractor-trailer, the court held that the government had failed to prove by a preponderance of the evidence that Ozuna voluntarily consented to the search of the trailer. Upon comparing the signature on the consent form to Ozuna's known signatures, the court was not convinced that Ozuna had actually signed the form. It also expressed doubt regarding portions of Glynn's testimony, due to the serious risks the agents would have faced had the search occurred as Glynn described. Ultimately the court determined that, although it was a close question, it was not persuaded by the greater weight of the evidence that the government's version of events was true, and it granted the motion.

Following the hearing, the government submitted the consent-to-search form for fingerprint and handwriting analysis. Ozuna's fingerprints were not on the form, but a handwriting expert concluded that the signature was Ozuna's. On March 14, 2005, the government filed a motion to reconsider or supplement the suppression hearing with additional testi-

mony from its handwriting expert. The district court denied the motion to reconsider and requested a response from Ozuna regarding the motion to supplement the hearing. In response, Ozuna argued that the additional testimony would not relate to the issue of whether the search was consensual, and that if the hearing were reopened, it would be prejudicial to allow the testimony of the government's handwriting expert without appointing an impartial handwriting expert to conduct an independent review of the evidence. He later filed an additional objection to the government's use of expert handwriting testimony on the ground that it did not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The court granted Ozuna leave to hire an expert and conducted hearings to consider the testimony of both handwriting experts.

The defense expert, Ellen Schuetzner, explained that there were several inconsistencies and "voids" within the pen strokes that could indicate forgery. She had not, however, examined the document prior to its treatment for fingerprint analysis, and she noted that the chemical treatment or a faulty pen could also have resulted in these inconsistencies. After comparing and contrasting the questioned signature and known signatures, Schuetzner concluded that there were "indications" Ozuna may have signed the form, which she described as a "very weak opinion of authorship."

James Regent, the prosecution's expert, testified that he had concluded with his "highest degree of confidence" that Ozuna had signed the questioned document. He explained that the writing appeared natural, that he did not find evidence of simulation,

and that all dissimilarities between the questioned and known signatures were within the expected range of variation.

On June 24, 2005, the court vacated its prior ruling and denied Ozuna's motion to suppress. The court explained that it gave little credence to Regent's conclusion that Ozuna had in fact signed the form. Instead, the court found the testimony of both witnesses useful in conducting its own evaluation of the signatures. After examining the questioned and known signatures, the court concluded by a preponderance of the evidence that Ozuna had signed the consent-to-search form. Based on this conclusion, the court found Ozuna's testimony to the contrary untruthful. Because of the court's adverse determination regarding Ozuna's credibility, it found, notwithstanding its previous reservations, that Glynn's testimony regarding the search was more likely true than not and held that Ozuna had consented to the search.

On January 12, 2006, Ozuna filed a motion to reconsider the denial of his motion to suppress. In this motion, Ozuna argued that he had new evidence that would support his testimony and discredit that of Agent Glynn. He also maintained that the court's reliance on handwriting testimony was improper. The court held another hearing to consider additional evidence regarding the search, but it ultimately denied Ozuna's motion.

B. Ozuna's First Trial

Ozuna's first trial took place from August 7 to August 10, 2006. Among numerous witnesses, the government called Agent Lumpkin, who testified about his contacts with the Chicago-based DEA

agents and his interactions with Ozuna after he was released to cooperate with the government. Lumpkin described his efforts to locate Ozuna after he fled prosecution, as well as Ozuna's subsequent arrest and confession.

Ozuna called his ex-girlfriend, Oney Rios, and her sister, Jessica Rios, to testify about their contacts with Agent Lumpkin. Both Rios sisters claimed that Lumpkin had called them to ask about Ozuna and made various threats when he believed they were being uncooperative. For example, Oney testified that Lumpkin had asked her to lie, threatened to charge her with crimes related to the 200 kilograms of cocaine, and asked her if she wanted to spend the rest of her life in jail. Jessica stated that Lumpkin had threatened to tell her employer of her former career as a "dancer at night."

During the government's rebuttal case, Lumpkin testified that he had contacted both Rios sisters during his pursuit of Ozuna. He stated that he had agreed to help Oney Rios with a felony warrant that was out for her arrest and admitted to having heated words with her when she was uncooperative. He denied, however, making any improper threats.

On August 11, 2008, the court declared a mistrial after the jury was unable to reach a unanimous verdict.

C. Ozuna's Second Trial

Ozuna's second trial took place from November 2 through November 9, 2006. At this trial, the government narrowed the focus of its case-in-chief. The government called numerous witnesses who testified to the surveillance conducted on July 28, 2003, the stop and search of Ozuna's truck, the discovery of the

cocaine, and Ozuna's confession and decision to cooperate with the DEA. However, it did not call Agent Lumpkin and did not present evidence about Ozuna's flight from prosecution or his confession at the time of his arrest a year later.

During the defense's case-in-chief, Ozuna sought to introduce numerous pieces of evidence that the claimed were relevant to the credibility of the agents involved in the investigation and the government's case. These included (1) testimony regarding Lumpkin's contacts with the Rios sisters; (2) questioning regarding the alleged fabrication of a DEA-6 form[2] memorializing Lumpkin's discussion with Jessica Rios; (3) testimony from Andreas Macias, whose previous identification of Ozuna the defense claimed the government falsified; and (4) Lumpkin's testimony from a previous proceeding regarding his interactions with truck drivers carrying cocaine. The defense argued that this evidence was necessary to support its theory that the government was attempting to convict Ozuna at any cost. The district court refused to admit this evidence based on Federal Rule of Evidence 403 and because it was irrelevant.

On November 9, 2006, the jury found Ozuna guilty. He was sentenced to twenty-five years' imprisonment, followed by five years of supervised release.

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[2] Although the parties do not define or explain a "DEA-6" form, it is apparently a report in which agents memorialize their interviews during an investigation.

II. ANALYSIS

The issues Ozuna raises on appeal fall into two categories. First, Ozuna asserts that the district court erred by considering the handwriting experts' testimony and subsequently denying Ozuna's motion to suppress the seized cocaine. Second, Ozuna argues that the district court improperly excluded evidence that he claims was necessary to present his theory of defense. We discuss each issue in turn.

A. Consideration of the Handwriting Evidence and the Motion to Suppress the Seized Cocaine

Ozuna challenges the district court's decision to deny his motion to suppress after considering expert handwriting testimony. He first argues that the district court erred in reopening the suppression hearing and allowing the government to present new evidence that was available to it at the time of the original hearing. Next, he claims that the district court erred in failing to conduct a *Daubert* analysis. Because he maintains that handwriting comparison techniques are not sufficiently reliable, he argues that the district court should not have considered the expert testimony at the hearing.

1. Reopening the Suppression Hearing

This court has generally given wide latitude to district courts to reopen suppression hearings for consideration of newly obtained evidence. *See, e.g., United States v. Scott,* 19 F.3d 1238, 1243 (7th Cir.1994); *United States v. Duran,* 957 F.2d 499, 505-06 (7th Cir.1992). Ozuna claims that his same latitude is not warranted where the evidence was available at the time of the previous hearing. In fact, he argues that the government should never be allowed to supplement a suppression hearing unless the evi-

dence is newly acquired. He asserts that because the government could have subjected the document to handwriting analysis prior to the first hearing, it should not have been allowed to present this evidence at the second hearing. We find this argument unpersuasive.

As we have previously recognized, society has a strong interest in admitting all relevant evidence. *United States v. Regilio,* 669 F.2d 1169, 1177 (7th Cir.1981). Thus, a defendant is entitled to suppression only in cases of constitutional violations, and the district court remains free throughout the trial to reconsider its previous orders suppressing evidence. *Id.* Because of society's interest, we have never required the government to justify a request for reconsideration of a prior ruling. *See id.*; *see also United States v. Bayless.* 201 F.3d 116, 131 (2d Cir.2000) (opining that the Seventh Circuit has rejected "a rule requiring the government ... to proffer a justification for its failure to present the relevant evidence at the original suppression hearing"). We now likewise decline to impose a justification requirement to reopen a suppression hearing. Instead, we hold that this decision lies within the sound discretion of the district court.

We are not the only circuit to reach this conclusion. *See In re Terrorist Bombings of the U.S. Embassies in E. Afr.,* 552 F.3d 177, 196 (2d Cir.2008); *see also United States v. Rabb,* 752 F.2d 1320, 1323 (9th Cir.1984) (citing *Regilio* with approval and holding that "[a] criminal defendant acquires no personal right of redress in suppressed evidence"), *abrogated on other grounds by Bourjaily v. United States,* 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). For example, the Second Circuit has held that "on a mo-

tion to reopen a suppression hearing, there is no bright-line rule that necessarily and invariably requires the government to provide a reasonable justification for its failure to offer relevant evidence at an earlier suppression proceeding." *In re Terrorist Bombings,* 552 F.3d at 196. Because of the policy favoring introduction of lawfully obtained evidence, the Second Circuit states that " 'vague notions of unfairness ... ought not [to] control.' " *Id.* (second alteration in original) (quoting *Bayless,* 201 F.3d at 132). Instead, the court noted that the government's justification for the delay was merely one factor to consider, leaving the ultimate determination to the discretion of the district court. *Id.* at 196-97.

Several of our sister circuits have, however, adopted rules requiring the government to justify reconsidering, reopening, or supplementing suppression hearings. *See, e.g., United States v. Dickerson,* 166 F.3d 667, 679 (4th Cir.1999), *rev'd on other grounds,* 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000); *United States v. Villabona-Garnica,* 63 F.3d 1051, 1055 (11th Cir.1995); *McRae v. United States,* 420 F.2d 1283, 1288 (D.C.Cir.1969). These circuits most often cite justifications of judicial economy and a desire to avoid "piecemeal litigation." *See Dickerson,* 166 F.3d at 679; *see also McRae,* 420 F.2d at 1288 (noting that "[t]o allow the loser at a pretrial suppression hearing to demand a de novo determination at trial" would defeat the purposes of promoting judicial efficiency and ensuring that trials not be interrupted or delayed). Rather than cite these cases, Ozuna points to concerns about fairness, noting that "repeated litigation imposes on the defense the impossible burden of conducting multiple hearings with limited resources."

These policy concerns are justified, but we do not believe that a bright-line rule is the sole way to protect them. By leaving the matter to the district court's discretion, the court remains free to refuse to reopen the suppression hearing or to decline to consider the government's evidence if the government is wasting judicial resources or proceeding in a way that is unfair to the defendant. At the same time, adopting a more flexible approach protects society's interest in ensuring a complete proceeding where the court considers all relevant, constitutionally obtained evidence. Thus, "a district court should be permitted, in the exercise of its discretion and in light of the totality of the circumstances, to determine whether its suppression ruling should stand." *In re Terrorist Bombings*, 552 F.3d at 197.

Having determined that a district court may, in its discretion, reopen a suppression hearing even where the evidence was previously available, we consider whether the district court's decision to do so in this case was proper. Although this court has not articulated a standard by which we review a district court's decision to reopen a suppression hearing and reconsider a prior ruling,[3] we believe it is clear from the preceding analysis that our review is for abuse of discretion.[4]

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[3] We have previously ruled on this issue but have never declared the applicable standard of review. *See, e.g., Scott*, 19 F.3d at 1243; *Duran*, 957 F.2d at 505-06. We have, however, applied an abuse of discretion standard to reopen a hearing where the district court had not yet ruled on the issue. *United States v. Wanigasinghe*, 545 F3d 595, 598 (7th Cir.2008).

[4] Ozuna argues that because our analysis does not require the determination of underlying facts, review should be *de novo*. This argument is meritless. The district court's decision to re-

The district court did not abuse its discretion in reopening the suppression hearing and considering the handwriting testimony. We have noted that reopening a suppression hearing may be appropriate when the proffered evidence calls the credibility of a witness into question. *See Scott*, 19 F.3d at 1243; *Duran*, 957 F.2d at 506. In this case, the handwriting comparison testimony had a direct bearing on Ozuna's credibility. If this testimony showed that he had, in fact, signed the consent form, it would mean that he had perjured himself at the previous hearing. This information would assist the district court in determining whose version of the search to believe, resulting in a more accurate ruling on the motion to suppress.

Furthermore, there is no evidence that the government was engaged in a deliberate strategy to proceed in a piecemeal fashion or otherwise waste judicial resources. It does not appear from the record that the signature was clearly at issue until the first suppression hearing. Only then did the court express its doubts regarding its authenticity. After noting that this was a close issue, the court determined that the government had not met its burden of proof. The government then responded by requesting handwriting and fingerprint analyses. This was an entirely reasonable course of action given the court's ruling.

Finally, we note that Ozuna has not convinced us that he was harmed in any way by the fact that the handwriting testimony was presented at the second,

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open the suppression hearing involved questions of whether evidence was relevant to a witness's credibility. Such decisions are clearly factual rather than legal, rendering *de novo* review inappropriate. *See United States v. Hernandez-Rivas*, 513 F.3d 753, 758 (7th Cir.2008).

rather than the first suppression hearing. Ozuna argues that repeated litigation imposes the "impossible burden" on the defense of conducting multiple hearings with limited resources. But the court's decision to reopen the hearing did not prevent Ozuna from presenting any evidence or making any arguments. Indeed, he called his own handwriting expert, and his counsel extensively cross-examined the government's witness. Although the document was damages by the government's fingerprinting analysis before Ozuna's handwriting expert could examine it, this was not a result of reopening the suppression hearing. Had the government presented the evidence at the first suppression hearing, the document still would have been subjected to chemical treatment before it was turned over to Ozuna. Given these considerations, the district court did not abuse its discretion in reopening the suppression hearing.

2. Failure to Conduct a Daubert Analysis

Ozuna claims that even if reopening the suppression hearing was proper, the district court erred by failing to conduct a *Daubert* analysis prior to considering the handwriting testimony. In *Daubert*, the Supreme Court held that it was the duty of the trial judge to examine expert evidence before trial to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589, 113 S.Ct. 2786. Thus, the district court serves a "gatekeeping" function to prevent expert testimony from carrying more weight with the jury than it deserves. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir.2000); *see also Daubert*, 509 U.S. at 595, 113 S. Ct. 2786 ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." (quotations omitted)).

Ozuna argues that *Daubert* applies with full force in suppression hearings, just as it does in trials, but he cites no law that effectively supports this contention. In fact, he concedes that the Rules of Evidence do not apply at pre-trial admissibility hearings. *See United States v. Matlock*, 415 U.S. 164, 172-73, 94 S.Ct. 988, 39 L.Ed. 2d 242 (1974); *United States v. Severson*, 49 F.3d 268, 271 n. 2 (7th Cir.1995). Rule 104(a) makes this explicit. When ruling on admissibility, a district court judge "is not bound by the rules of evidence except those with respect to privileges." Fed.R.Evid. 104(a). We see no persuasive reason to disregard the Rules of Evidence and impose a new requirement on district court judges to conduct a *Daubert* analysis during suppression hearings.

The only case Ozuna cites in support of his argument is *United States v. Posado*, 57 F.3d 428 (5th Cir.1995). There, the district court had applied a *per se* rule against considering polygraph evidence at any time, including a suppression hearing. *Id.* at 432. The Fifth Circuit reversed, holding that a *per se* rule against admissibility was no longer viable after the Supreme Court's decision in *Daubert*. *Id.* at 433. But no language in *Posado* supports the argument that a district court *must* conduct a *Daubert* analysis at a pre-trial suppression hearing. The Fifth Circuit merely held that district courts could not be *prohibited* from considering that evidence or assessing its reliability. *See id.* In fact, the court noted that the Rules of Evidence are relaxed in a suppression hearing because "[a] district court judge is much less likely than a lay jury to be intimidated by claims of scientific validity into assigning an inappropriate evidentiary value to [scientific] evidence." *Id.* at 435.

In other words, the primary rationale behind *Daubert* is not applicable in a suppression hearing. The purpose of *Daubert* was to require courts to serve as gatekeepers so that unreliable expert testimony does not carry too much weight with the jury. *Smith*, 215 F.3d at 718. Judges, on the other hand, are less likely to be swayed by experts with insufficient qualifications. *Posado*, 57 F.3d at 435; *see also In re Salem*, 465, F.3d *767*, 776-77 (7th Cir.2006) (upholding a bankruptcy court's finding that "[t]he gatekeeping function that *Daubert* talks about is most pointedly at issue in a jury trial where a jury might be misled by an expert who doesn't have sufficient qualifications" (quotations omitted)). For this reason, we have held that a court conducting a bench trial could make reliability determinations as the evidence was presented throughout the trial, rather than during a formal pre-trial *Daubert* hearing. *In re Salem*, 465 F.3d at 777. Nothing in the Rules of Evidence or our case law prohibits a judge from taking a similar course of action during a suppression hearing.

Because the district court was not required to conduct a *Daubert* hearing, we review its consideration of the expert testimony for an abuse of discretion. *Cf. Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 505 (7th Cir.2003) ("[I]f the district court properly applied *Daubert*, we review the court's decision to admit or exclude expert testimony only for an abuse of discretion." (quotations omitted)). The district court in this case carefully considered the handwriting testimony. It chose to credit some of the experts' analyses and discredit certain conclusions that it found unconvincing. It then used the expert testimony to guide its own analysis and determine whether Ozuna had signed the consent form. This was a rea-

sonable use of the district court's discretion, and the decision to admit the seized cocaine was proper.

B. The Exclusion of Ozuna's Proffered Evidence

As another basis for his appeal, Ozuna claims that the court's decision to exclude several pieces of evidence undermined his ability to present his theory of defense. Ozuna maintains that most of this evidence was relevant to show that the government would go to "any lengths," including fabricating evidence, to apprehend and convict him. Ozuna also argues that Agent Lumpkin's testimony at a prior suppression hearing was relevant to Ozuna's knowledge that the trailer contained cocaine.[5] The court suppressed all of this evidence, either because it was irrelevant or because its probative value was outweighed by one of the concerns listed in Rule 403.

The district court has broad discretion to control the admission of evidence. *United States v. Khan*, 508 F.3d 413, 417 (7th Cir.2007). "Evidence is relevant and therefore admissible if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Van Allen*, 524 F.3d 814, 825 (7th Cir.2008) (quoting Fed.R.Evid. 401). Under

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[5] Ozuna seems to indicate that Lumpkin's testimony regarding his experience with truck drivers hauling cocaine is also relevant to his theory of government fabrication. However, the substance of his argument makes clear that he is truly arguing that the testimony went to knowledge. Because we view the evidence as more relevant to Ozuna's knowledge than his conspiracy theory, we analyze it separately. At any rate, this evidence does not change our analysis, *see infra* Part II.B.2, that Ozuna did not present convincing evidence to support a theory that the government fabricated evidence against him.

Rule 403, however, even relevant evidence may be excluded if its probative value is substantially outweighed by, for example, the danger of unfair prejudice. Fed.R.Evid. 403. Thus, a district court may exclude collateral or irrelevant evidence where its tendency to mislead and confuse the jury substantially outweighs its probative value. *United States v. Jackson*, 540 F.3d 578, 588 (7th Cir.2008). We review a district court's evidentiary determinations for an abuse of discretion and reverse only "when no reasonable person could take the view adopted by the trial court." *Khan*, 508 F.3d at 417 (quotations omitted). With this framework in mind, we now turn to Ozuna's arguments.

1. Evidence of the Government's Allegedly Improper Conduct

Ozuna points to evidence that he claims demonstrates that the government fabricated evidence to obtain a conviction. These include Agent Lumpkin's interactions with the Rios sisters, an allegedly fabricated DEA-6 form memorializing Lumpkin's conversation with Jessica Rios, and testimony about an allegedly orchestrated identification of Ozuna by Macias.[6] The district court held that all of this evidence was not material to Ozuna's guilt or innocence or was only tangentially related to the case at hand and excluded it. We conclude that this was not an abuse of discretion.

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[6] Ozuna also sought to enter into evidence various portions of the DEA manual. He claims that the agents' violation of certain protocols supports his theory of government fabrication. Each portion of the manual is tangential to this case, and as such, this argument is meritless and does not warrant further consideration.

None of Ozuna's proffered evidence was relevant to his conduct on July 28, 2003, nor the evidence the government presented at trial. Ozuna simply made vague allegations of improper government conduct without ever connecting that conduct to his apprehension or the search of his trailer. He did not make any connection whatsoever between the allegedly improper actions and the agents who were directly involved in the search. Thus, nothing about the evidence had any tendency to make more or less likely any fact of consequence to Ozuna's guilt. *See* FedR.Evid. 401. Instead, presenting this evidence would likely have confused the jury with tangentially related facts. Excluding the evidence was therefore not an abuse of discretion.

Ozuna correctly notes that even the Rules of Evidence cannot be used to deprive a defendant of his due process right to present a complete defense. *See Holmes v. South Carolina,* 547 U.S. 319, 324-27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *United States v. Harris,* 942 F.2d 1125, 1130-31 (7th Cir.1991). We have held that "a defendant is entitled to have the jury consider any theory of the defense that is supported by the law *and that has some foundation in the evidence.*" *United States v. Wiman,* 77 F.3d 981, 985 (7th Cir.1996) (emphasis added) (quotations omitted).

The problem with Ozuna's argument is that the theory that his conviction resulted from fabricated evidence has no foundation. As noted above, the excluded evidence had no bearing on what occurred on July 28, 2003. Had the government presented the allegedly fabricated evidence in its case-in-chief, our analysis may have been different. For example, if the government had used Macias's identification against

Ozuna, certainly a claim that his identification was manufactured or orchestrated by the government would be relevant. Similarly, the Rios sisters' testimony was proper in the first trial because Lumpkin had testified about the events after Ozuna's flight from prosecution, However, the government confined its case in this trail to the facts surrounding the search of his tractor-trailer. Ozuna has failed to connect any of his proffered evidence to the government's actions at that time or the agents involved in the search. Thus, the district court did not abuse its discretion in excluding the evidence.

2. Lumpkin's Testimony Regarding His Interactions with Truck Drivers

During a suppression hearing on April 24, 2006, the district court questioned Agent Lumpkin about Ozuna's release. The purpose of this inquiry was to determine whether Aguilar, who had orchestrated the drug sale, would have been suspicious that Ozuna was cooperating with law enforcement because he was released after the cocaine was seized. Lumpkin stated that sometimes when trucks travel from Mexico to the United States, their drivers are unaware of what the warehouse had put into their trailers when loading produce. He further commented:

> A tractor-trailer holds 60 to 70,000 pounds, and in four small boxes of ... what they say could be limes, they had commingled in there 50 or 80 or a couple hundred kilos of coke; you may not know. I mean, through my training and experience of working on the border, sometimes they-these guys don't know. And they followed all the rules, they checked their produce and checked it out and they have got the lock on the back and

> they're doing their job and sometimes it's not working for them.

Thus, Lumpkin noted, it would be reasonable for Aguilar to think that the agents had believed Ozuna when he said he didn't know the cocaine was in the truck.

Ozuna sought to admit this testimony at his trial. The district court refused. The judge noted that the fact that a truck driver might not know about the presence of controlled substances is self-evident and that expert testimony was not needed. He also commented that the circumstances regarding the situation Lumpkin described and Ozuna's situation were different. Ozuna had no paperwork for the limes, so they had no legitimate destination; their only purpose was to conceal the cocaine. Ozuna claims that this was an "obvious" abuse of discretion because "[t]he admission of this testimony would make Mr. Ozuna's claim that he did not know about the narcotics in the truck seem more likely to the jury." We disagree.

The district court did not abuse its discretion in determining that Lumpkin's testimony was not helpful to the jury. Lumpkin was not addressing whether it was possible that Ozuna *actually* knew about the cocaine. Instead, the purpose of describing this scenario was to determine whether Aguilar would have suspected Ozuna's cooperation with law enforcement because he was released. He concluded that Aguilar may have believed Ozuna's story because *sometimes* truck drivers are unaware their trucks contain cocaine when they are legitimately transporting produce. Admitting this testimony would have allowed the jury to take Lumpkin's remarks out of context. It

was therefore not an abuse of discretion to exclude them.

Furthermore, even if this was an error, it was harmless. An error is harmless when it does not affect the outcome of the trial, in other words, where we are "convinced that the jury would have convicted even absent the error." *United States v. Ortiz,* 474 F.3d 976, 982 (7th Cir.2007), *cert. denied,* --- U.S. ----, 128 S.Ct. 51, 169 L.Ed.2d 44 (2007). This testimony was one hypothetical postulation about some truck drivers in scenarios factually different from Ozuna's. It had little probative value into Ozuna's specific circumstance. The jury was informed by Ozuna's arguments and common sense that some truck drivers could be unaware that their trucks contain cocaine. We are convinced that the jury would have convicted Ozuna even if it had been allowed to consider Lumpkin's testimony.

III. CONCLUSION

The district court did not err in reopening the suppression hearing to consider the handwriting testimony. The court was not required to conduct a *Daubert* analysis, and its ruling in light of the expert testimony at the hearing was not an abuse of discretion. Finally, the court did not err in excluding Ozuna's proffered evidence. We AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

V.

MODESTO OZUNA

JUDGMENT IN A CRIMINAL CASE

Case Number: 03-CR-757-1 Page 1 of 5

USM Number:

Beau Brindley
Defendant's Attorney

THE DEFENDANT:

X was found guilty on count(s) One of the superseding indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense
21 U.S.C. § 841(a)(1)	Possession with the Intent to Distribute Cocaine

Offense Ended	Count
07/28/2003	Superseding One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X Count(s) original count one is dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 13, 2007
Date of Imposition of Judgment

/s/ John F. Grady
Signature of Judge

John F. Grady, United States District Judge
Name and Title of Judge

June 22, 2007
Date

DEFENDANT: Modesto Ozuna
CASE NUMBER: 03-CR-757-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

25 years as to Count One.

x The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant participate in the Bureau of Prisons Comprehensive Drug Treatment Program.

x The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY_____
DEPUTY UNITED STATES MARSHAL

Judgment — Page 3 of 5

DEFENDANT: Modesto Ozuna
CASE NUMBER: 03-CR-757-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

The defendant is sentenced on all count(s) of conviction, namely, Count One to a period of 5 years of Supervised Release. The defendant is ordered to participate in a drug aftercare program at the direction of the Probate Office, which may include urine testing which may not exceed more than 104 tests per year.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defen-

dant's compliance with such notification requirement.

Judgment — Page 4 of 5

DEFENDANT: Modesto Ozuna
CASE NUMBER: 03-CR-757-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ WAIVED	$ N/A

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Priority or Percentage
Total Loss*	**Restitution Ordered**
TOTALS $0	$0

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Judgment — Page 5 of 5

DEFENDANT: Modesto Ozuna
CASE NUMBER: 03-CR-757-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $100.00 due immediately

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MODESTO OZUNA,)
)
Defendant.)

Docket No. 03 CR 757

Chicago, Illinois
March 2, 2005
2:45 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
MOTION TO SUPPRESS

BEFORE THE HON. JOHN F. GRADY

* * * * *

[108] THE COURT: All right. Thank you.

This decision comes down to a question of credibility. The search took place here without probable cause for an arrest pursuant to which a search might be made, and it took place without a search warrant. Therefore, the burden shifts to the government to prove that the search of the truck was authorized.

And the government's position is that it was authorized by the defendant's consent.

So that's the ultimate issue before the Court, has the government proved by the greater weight of the evidence that the defendant voluntarily consented to the search of the truck.

Let me deal first with the events leading up to the stopping of the truck. I'm going to put one side the question of whether there has been a sufficient showing that Agent Glynn had a right to rely on the report of Agent Lumpkin as to what the occurrence of certain events would indicate once the matter got on the ground here in Chicago.

I'm going to assume for purposes of this discussion that he was reasonable in giving credit to the information provided by the confidential informant to Agent Lumpkin and we'll go from there.

The agents, as a group, observed Aguilar and Garcia [109] arrive on Continental Airlines from Texas. They observed Aguilar and Garcia visit the Arrow lot. They observed the defendant arriving at the Comfort Inn. They observed Aguilar and Garcia arriving at the Comfort Inn. Aguilar and Garcia were there for some 15 minutes or so and then departed, entering their own rented vehicle again. And thereafter, the defendant left the Comfort Inn and entered the truck that was parked there marked with the sign Ozuna's Express and bearing a Washington license plate.

I believe that Agent Glynn was justified in concluding from these facts that there was a reasonable likelihood that Aguilar and Garcia had visited with Ozuna in the Comfort Inn. As the evidence has indicated, it's a small hotel. And while there could have

been another explanation for those three people entering and leaving that motel, it was not an unreasonable inference that they had met together.

The defendant then entered the very kind of truck that Agent Glynn had been informed would be carrying -- or would be likely to be used for the carrying of cocaine and drove toward a parking lot where earlier Aguilar and Garcia had been seen having come there directly from the airport.

All of these facts, it seems to me, were sufficient to justify a Terry stop in that they gave rise to a reasonable suspicion that Ozuna was knowingly transporting drugs in that tractor trailer. Therefore, I think that a Terry stop was [110] justified.

Now, that's just by way of introduction because Terry stop or not, the government is not relying on a Terry stop for much of anything except to explain how it was that the defendant was stopped and gave a consent to search the truck.

It's the next step of the analysis where the problems arise.

Agent Glynn and the defendant tell different stories, about as dramatically different as they could possibly be. They are obviously not both telling the truth. That's easy to see.

The question is, who is telling the truth and about how much? The government has the burden of persuading me that Agent Glynn is telling the truth.

What I'm about to say in the following analysis must be understood as not a finding that anyone is, in fact, lying on what happened at the time of the stop and thereafter but, rather, a comment on

whether the Court is satisfied that the government has met its burden of proof.

People can be telling the truth, but if the trier of fact is not persuaded by the greater weight of the evidence that that person is telling the truth, the burden of proof has not been satisfied. And that does not reflect on the honesty of the witness; it simply states the fact that the burden has not been met.

[111] Now, let me begin with Mr. Ozuna. His testimony that he did not tell the agents the numerous things that the agent then says he told him about his connection with Aguilar and Garcia and the hauling of drugs from Texas to Chicago, is not believable. Clearly Ozuna was lying about that.

I'm satisfied that once he had been caught, he decided to cooperate and told the truth. Unfortunately for him, any mileage he was going to get out of that, in terms of cooperation, has been destroyed by this afternoon's testimony. He has said that that's not true and, therefore, I doubt that the government would attempt to use him as a witness against Aguilar or Garcia.

So we know -- or I know that Ozuna would lie if it suits his purpose, or if he thinks it suits his purpose. In fact, had he told the truth about his relationship with Aguilar and Garcia, I would be much more inclined to believe his testimony about the rest of the case.

Now, the nub of the controversy here is whether Ozuna executed a voluntary consent to search the truck, and that has to do with whether or not there was any pressure brought upon him, whether he, in fact, perceived that he was free to leave, whether any weapons were displayed, and just generally whether

the Terry stop turned into an arrest. The government has not proved to me that it did not turn into an arrest.

It is not unreasonable to me that the agents would [112] have perceived Ozuna to be a threat. They haven't the slightest idea what's inside the cab of that truck, whether there's a shotgun in there or a handgun or any other kind of weapon that the driver of the truck could turn on them and kill or injure them in connection with the stop they were about to make.

Now, it may well be, as Agent Glynn testified, that this was a polite, civil stop involving nothing but a polite request to dismount, but it could also be that the agents, reasonably fearing that their own safety was involved, did, in fact, display weapons and did, in fact, treat the defendant as an adversary rather than a mere citizen they were stopping to acquire information from.

I don't know what the truth is, and I'm not saying that anybody is lying about it. What I am saying is, I'm not persuaded by the greater weight of the evidence that the government's version of it is more likely true than not true.

I can't tell from these signatures on these various documents whether Ozuna, in fact, signed the consent to search. The signature on that document, Government Exhibit 1, looks different to me than the signatures on the other three documents.

The signatures on the other three documents look more like each other than any of them looks like the signature on Government Exhibit 1.

[113] Now, of course, I'm not a handwriting expert, but we all know the law is that a lay trier of

fact can compare handwriting and come to a conclusion. And while I certainly do not conclude that the defendant's signature was forged on Exhibit 1, I cannot in good conscience conclude that it is his signature. It just doesn't look like the other signatures to me.

Now, we all know that we sign our name a different way every time, so I'm sophisticated enough to know that differences exist. But these differences are just too great for me to be comfortable in saying that that is Ozuna's signature on the consent. And I can't say that.

It's a situation where the fact that Ozuna is lying about part of the case doesn't necessarily mean that he's lying about all of it. And I cannot conclude that he's lying about the search. His story about it is not unreasonable.

The idea that the agents would let him get up into the cab without their being there and before they searched the cab for the purpose of getting a key, doesn't make any more sense to me than the proposition that they would not have prepared to meet violence with violence at the time they made the stop of this person who was suspected of being the repeated hauler of enormous quantities of illegal drugs.

This is not a traffic stop of an ordinary citizen who's exceeding the speed limit. This is a stop of a [114] potentially dangerous and potentially murderous criminal.

And they may have done it exactly the way Agent Glynn says they did it. If they did, they took a very great risk. He testified that if Ozuna had tried anything, he would have regretted it. Well, it may be

true and may be not. I'm sure there are many police officers who live to regret placing too much reliance on the assumption that they were going to be safe.

Now, of course, nobody says there was any probable cause to search the truck. The search was either consented to or it was invalid.

I cannot conclude by the greater weight of the evidence that the search was consented to. Therefore, I'm going to grant the defendant's motion to suppress as evidence the search of the truck and the drugs that were found in the truck. I will prepare a short order to that effect.

I will put the case over for a status report. How about next Wednesday, March 9, at 10:30? And at that point the government will have decided whether they are going to appeal this, I suppose, and we can see what we're going to do with the case.

* * * * *

APPENDIX D

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	John F. Grady
Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 CR 757
DATE	3/8/2005
CASE TITLE	United States vs. Ozuna

DOCKET ENTRY TEXT:

Defendant's motion to suppress evidence of the search of his trailer and the contents thereof [ ] is allowed, and that evidence is suppressed. A status conference is set for March 15 2005, at 11:30 a.m. to discuss whether evidence of the defendant's statements should also be suppressed. ENTER ORDER.

Notices mailed by judge's staff.

Courtroom Deputy Initials: KM

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
MODESTO OZUNA,	)
	)
Defendant.	)

Docket No. 03 CR 757

Chicago, Illinois
June 24, 2005
9:50 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
RULING

BEFORE THE HON. JOHN F. GRADY

* * * * *

[6] THE COURT: Let me give you my findings on the signature, and then we'll discuss where we go from there. You can have a seat.

I found the testimony of the experts useful only in the limited sense that I indicated prior to the hearing I would consider it for. I was unimpressed by the jargon of the experts as to whether something was identified or indicated, whether something was

fundamental or not fundamental, significant or not significant. It did not seem to me that either expert, and particularly the government expert, had a solid basis for these distinctions. So as far as my giving credit to the government's expert when he said he believes this is the defendant's signature on the questioned document, I do not give any weight to his conclusion in that regard.

What I do give weight to, however, as I give similar weight to the testimony of the defense expert, is the actual differences and similarities in the questioned and known signatures that they both pointed out. That testimony helps me significantly in coming to my own conclusion as to whether the signature on the questioned document was written by the defendant.

What I would like to do is discuss with you Government's Exhibit 1 I think it is.

MS. LITTLETON: Government Exhibit Chart.

[7] THE COURT: Government Exhibit Chart.

The number one signature is, of course, the questioned signature on the consent to search, and the others are known signatures of the defendant.

One thing that is, I think, important to note is that there are very distinct differences in the known signatures in many respects. The testimony that a person never signs his signature the same or exactly the same way two times seems to be borne out by the differences in the known signatures.

For instance, the opening M in Signature Number 4 seems to be different from the opening M in 3 and 2 as well. Similar but different.

The O on the first name Modesto is different throughout Signatures 2 throughout 7. In some it is almost recognizable as an O, as in 2. But in 4, for instance, one would not know what it is. And the same is true in 5. In 6 we come back to something that looks like an O. In 7 we're back to something that doesn't look like much of anything.

And I can go through a number of the signatures here and point out differences. For instance, the Ts differ from signature to signature. They are crossed in Signatures 2 and 3, but not in 4, not in 5, not in 6, not in 7. Because they are crossed, they obviously touch in 2 and 3; that is, the vertical portion of the T and the cross portion of the T touch and cross in 2 and 3. In 4 they don't touch at all and they [8] don't cross. There are -- that one, Number 4 is more like the T in the questioned Signature Number 1. The same is true of Signature Number 5. The cross portion of the T is above the upright portion, and there is a space between the two segments as there is in the questioned signature. And 6 and 7 are the same.

The Ozuna is slightly different as you look from 2 through 7, but I think basically the same. And maybe this is what the government witness was talking about when he talked about fundamental similarities or fundamental differences. We have the O and this distinctive formation of the Z in the Specimen Number 2, and that is true in all of the known signatures. But look at the difference between the -- what we'll call the extended line of the Z in Numbers 2 and 3 where it is a solid line. And in 5 there is a loop in it. It seems that after making the O the writer essentially made a loop and came around and finished up with the line out to the right.

So there are similarities and differences, but I have no difficulty concluding something I already know, that the same person wrote each of the Signatures 2 though 7, although there are differences in those signatures.

Now let's compare Specimens 2 through 7 to Specimen Number 1, the questioned signature. Lots of similarities. The distinctive Ozuna with the O and the -- O and the A resting essentially atop the Z figure that extends out to the right.

[9] There are similarities between the initial M and the other Ms in the questioned or the known specimens. There are differences, of course, in that there is no O at all.

And there are what the government expert referred to as two Ss in Modesto.

But here again as far as the T is concerned, it is remarkably similar to many of the Ts in the known specimens.

Now that analysis leads me on my own analysis to conclude that it is likely that the same person wrote Signature Number 1 as wrote Signatures Number 2 through 7.

But I don't think that alone would justify a conclusion that Mr. Ozuna wrote the questioned signature. There has to be more. But there is more, and that lies in the fact that there are only two possibilities, either this questioned signature was written by Mr. Ozuna or it is a forgery. Now if it is a forgery, it is more probable than not that it would be -- have been written slowly. I agree, Ms. Littleton, it would be virtually impossible for anyone to forge this Ozuna name writing rapidly, especially without having had a great deal of practice.

The uncontradicted testimony is that the questioned signature was not written rapidly. The government expert testified that this signature bears the earmarks of having been written rapidly. What did I say, not? Excuse me. Maybe I have to correct what I just said.

[10] What I meant to say is the uncontradicted testimony is that this signature was written rapidly and that it bears the earmarks of having been written rapidly. The expert told us his reasons for concluding that. There is no contradiction. The defense expert was here yesterday, could have testified to the contrary. I don't recall whether when she testified earlier this week or last week she said anything about whether she thought the questioned signature had been written rapidly or not. But in any event, there is no contradiction of the government testimony that it was written rapidly, and I don't think that a forgery could have been done rapidly.

Now another thing that I think is important is that the defense expert acknowledged a fairly large number of similarities between the questioned signature and the known signatures. At pages 4 and 5 of her report she listed those similarities, 4, 5, and 6.

She didn't find any fundamental difference, whatever that means. And I -- as I have said earlier, I was not satisfied that that's a truly meaningful term in this kind of analysis. But, in any event, she didn't find anything that indicated to her that this was not the signature, definitely not the signature of the same person who wrote the known signatures that she examined.

Now she said that she was unable to render a more definite opinion because of the fact that the

document she [11] examined had been run through some chemicals for a fingerprint analysis and that this had the effect of erasing some of the lines. Yet she acknowledged that if the lines were completed, filled in, in other words, as they are on copies of the known -- of the questioned document that were made before it was subjected to the chemical treatment that the signatures -- that the questioned signature would be similar to the known signatures that she compared them to.

At page 4 she said the questioned signature bears numerous possible pen lifts as noted above. However, if the line was written continuously in the questioned signature, it is consistent with the preparation of the known signatures.

I don't think that the witness was truly hampered by the fact that something may have been obliterated in the specimen she examined. There was enough of a signature left that she could render whatever opinion she saw fit to render, and I think she could have done -- could have come to a more definite conclusion on the basis of the information that she had without needing additional information.

In any event, as the government points out, her ultimate conclusion doesn't really disagree with that of the government expert. And more importantly she didn't point to any differences that I regard as either indicating or proving that Mr. Ozuna did not write the questioned signature.

Another important aspect of the fast writing in the [12] questioned signature is that according to the government expert it probably accounts for the differences between that signature and the known signature, and that makes sense to me. We all know

that if we write fast, we might tend to leave out something, some portion of a letter or maybe some letter altogether. Or certainly if we write fast our writing might be distorted and look different from the writing we would do if we were writing more slowly in our natural fashion.

Another reason I conclude this is not a forgery is that it does not make sense to me that someone who was going to take the time to attempt a forgery of this name would leave off, for instance, the O from Modesto, thus signaling to any observer an important difference between the forgery and the signature he's attempting to simulate. If you look at the known specimens, they were in the position -- in the possession of the possible forgers; namely, the advice of rights form and the Miranda form. There is on the advice of rights something that looks pretty much like an O. And on the Miranda form, at least something. You can't tell what it is, but at least there is something after the T. There is a line there. The hypothetical forger didn't put that in.

Also, the Ts on the two documents that the forger would have had in his possession were crossed. Why would the forger make a T like that on the questioned signature, a T that isn't crossed or where the horizontal line is above the [13] vertical line and unconnected to it.

So on the reasonable assumption that a forger will attempt to duplicate the known signature, it does not appear to the Court that any effort was made by anybody to duplicate the advice of rights signature and the Miranda signature in the questioned signature.

Another thing the forger wouldn't have done was to put two Ss in Modesto. There aren't two Ss in either of the exemplars that were available to that person. Why in the world would he highlight a possible difference by this gratuitous addition of an extra S or what appears to be an extra S?

On the other hand, I was impressed with the testimony of the government expert that the fast writing could account for the extra S and all sorts of other things.

The circumstances under which the consent was allegedly executed are consistent with a rapid signature. The defendant was allegedly standing by his truck. I don't know what he was writing on. I can't remember the testimony. But in any case it was not a situation where he would take great care in writing his signature. It probably was a situation where he was not particularly interested in whether his signature was exactly the way he usually wrote it nor was he interested in taking any particular care with the way it was written. So I think the circumstances under which the consent to search was allegedly signed indicate that the signature was [14] probably written with some speed.

For all of these reasons I find by a preponderance of the evidence that the signature on the consent to search is the true signature of the defendant Modesto Ozuna and that he signed it at the time and place testified to by the government witness. And I further find, obviously, by a preponderance of the evidence that Mr. Ozuna's testimony that he did not sign the consent to search was untruthful.

* * * * *

[23] THE COURT: Of course. Of course. That's very important.

What we have is a story by the agents as to the circumstances of the stop that I found implausible largely because it seemed that they were taking an unreasonable risk for their own safety when they approached the truck without weapons being drawn. Now that was based upon my assessment of the situation, not upon my assessment of any impeachment of the witness or any opinion that the demeanor of the witness gave any indication that he was being untruthful. It just seemed to me that the story was sufficiently unlikely that I could not find it to be more probably true than not true. I do recall that I took some pains to say that I wasn't finding anybody was lying. I simply said that the government had the burden of proof by a preponderance of the evidence and they have not satisfied it.

Now we have a situation where the testimony of the agents is contradicted by the testimony of a defendant who I have found has lied twice, once when he denied making the confession at the DEA office. I think it was following [24] the -- his arrest, and now secondly when he denied signing this consent to search. And Ms. Littleton has pointed out a third respect in which he lied which, of course, is just part of his whole account of the occurrence when he said that he was handcuffed at the side of the road. If he wrote this signature, which I found that he did, he couldn't have been handcuffed so he lied about that.

And the question before me now is whether I should find the government has failed to prove its theory by a preponderance of the evidence when its only handicap is the reservation I have about the plausibility of its agent's testimony. And, on the oth-

er hand, I have the testimony concerning the circumstances of the stop offered by someone who is known to me to be a perjurer; namely, the defendant.

Bearing in mind that we're talking about preponderance of the evidence here and not beyond a reasonable doubt, I conclude that the agent's story, notwithstanding the reservations I had about it at the time we had the hearing on the motion to suppress, is more probably true than not true.

The only contrary evidence that is offered is the defendant's story about the guns and rough treatment and the handcuffs, all of those things that indicate an arrest. The only evidence I have to support that view of the case is the testimony of a perjurer. Whereas the testimony in support of the government's theory that this was a Terry stop followed by [25] a voluntary consent, the testimony I have there is by a witness or witnesses -- I can't remember whether they both testified or not -- who were not impeached and who gave testimony that I might well have accepted in the absence of contradiction. The contradiction that I have here is worthless. I simply don't believe the defendant. I don't think any reasonable person could believe him.

So while in all candor I have to tell you that this is a close case, and the reason it is close is that I think these agents acted imprudently in approaching this truck not knowing what might be confronting them inside, I nonetheless conclude by the bare preponderance of the evidence that this was not an arrest but rather a Terry stop followed by a voluntary consent to search, and that therefore there is no basis to suppress the results of the search.

So my earlier ruling -- did I suppress the evidence at an earlier time? I think I did.

MS. LITTLETON: Yes, your Honor, you did.

THE COURT: My earlier ruling suppressing the evidence found in the search of the truck is vacated, and the motion to suppress is denied.

* * * * *

APPENDIX F

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	John F. Grady
Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 CR 757
DATE	6/24/2005
CASE TITLE	USA vs. Modesto Ozuna

DOCKET ENTRY TEXT:

Hearing on government's motion to reconsider suppression of evidence completed. The court finds that the defendant did voluntarily consent to the search of his truck prior to his arrest. Accordingly, the motion to reconsider is allowed and the order suppressing the evidence found in the truck is vacated.

Trial is set for July 26, 2005 at 10:00 a.m.

No notices required, advised in open court.

Courtroom Deputy Initials: AMM

No. 09-293

In the Supreme Court of the United States

MODESTO OZUNA, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld under an abuse of discretion standard the district court's decision to reopen the suppression hearing to allow the government to present the testimony of a handwriting expert.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 561 F 3d 728. The orders of the district court (Pet. App. 31a-37a, 39a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2009 On June 17, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 3, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possession of more than five kilograms

of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 25 years of imprisonment, to be followed by five years of supervised release The court of appeals affirmed. Pet. App. 1a-22a.

1. On July 28, 2003, Drug Enforcement Agency (DEA) Special Agent Michael Lumpkin of McAllen, Texas, informed DEA agents in Chicago that Claudio Aguilar and Mario Garcia were part of an organization that transported cocaine from Texas to Chicago in tractor-trailers with Washington license plates registered to a company called "Ozuna's Express." Agent Lumpkin advised that Aguilar and Garcia were traveling to Chicago that day and were due to arrive at O'Hare Airport later that afternoon. DEA Special Agent Robert Glynn and other agents began surveillance at O'Hare Airport and placed Aguilar and Garcia under surveillance immediately upon their arrival at the airport. They saw the two men drive from the airport to a hotel. They noticed an Ozuna's Express tractor-trailer with Washington license plates sitting in the hotel parking lot. They then saw petitioner exit the hotel, enter the tractor-trailer, and drive off Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

Agents Glynn and Task Force officer William McKenna stopped petitioner's tractor-trailer. Agent Glynn asked petitioner if there was any contraband or stolen property in the trailer, and petitioner replied that the trailer was empty. Agent Glynn asked petitioner for his consent to search the tractor-trailer and petitioner agreed to a search. Petitioner told the agents that the key to the locked trailer was in the cab area, and the agents allowed him to retrieve the key from the cab. Agent Glynn again asked petitioner if he was sure that

there was nothing in the tractor-trailer, and petitioner stated that there were boxes of limes in the tractor-trailer. Petitioner unlocked and unlatched the trailer door. At this point, Agent Glynn retrieved a DEA consent-to-search form from his car and read it to petitioner. Petitioner signed the form, and Agents Glynn and McKenna signed as witness. Agents then searched the tractor-trailer and discovered approximately 200 kilograms of cocaine hidden among boxes of limes. Pet. App. 3a; Gov't C.A. Br. 4.

Petitioner was taken to a DEA office where he admitted that he knew that he was transporting illegal drugs and that he had transported drugs in the same manner in the past. Pet. App. 3a; Gov't C.A Br. 5. Petitioner agreed to cooperate against Aguilar and was allowed to return to Texas for that purpose. But after he was arrested again in August 2004, he was indicted on a charge of possession of more than five kilograms of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a

2. Petitioner moved to suppress the cocaine seized from the tractor-trailer. Petitioner claimed that he did not consent to the search of the tractor-trailer, asserting instead that the agents had used bolt cutters to cut the lock and had forcibly searched the truck. Mot. to Suppress 3 (Jan 12, 2005)

At a March 2, 2005, hearing conducted on the motion, Agent Glynn testified to the facts as described above The government introduced into evidence the signed consent-to-search form. Petitioner testified that, as he was driving a tractor-trailer loaded with mangoes and limes from Texas to Chicago on July 28, 2003, the agents cut him off, pointed a weapon at his head, demanded that he exit the tractor-trailer, and handcuffed him.

Petitioner maintained that he never consented to a search of the tractor-trailer, did not retrieve the keys from the cab or unlock the trailer, and did not sign the consent-to-search form. He denied any knowledge of the cocaine found in the tractor-trailer, and further denied telling the agents about his connection to Aguilar and Garcia or his involvement in transporting cocaine. Pet. App. 4a, 34a.

The district court granted petitioner's motion to suppress. Pet. App. 31a-37a. While concluding that the DEA agents had been justified in stopping the tractor-trailer, the court found that the government had failed to prove by a preponderance of the evidence that petitioner voluntarily consented to the search of the trailer. The court found that petitioner had lied when he testified that he did not tell the agents about his connection to Aguilar and Garcia and that he did not know that cocaine was in the tractor-trailer. *Id.* at 34a. The district court expressed doubt, however, concerning portions of Agent Glynn's testimony. The court pointed to Agent Glynn's testimony that the agents had allowed petitioner to retrieve the key to the tractor-trailer from the cab, observing that the agents would have faced serious risks in allowing petitioner to retrieve something from the cab without accompanying him or closely monitoring him. *Id* at 4a, 35a-36a. Furthermore, after comparing the signature on the consent form to petitioner's known signatures, the court was not convinced that petitioner had actually signed the form. *Id* at 35a-36a. On balance and in light of all the conflicting evidence, the district court held that it was "not persuaded by the greater weight of the evidence that the government's version of [events] is more likely true than not true." *Id.* at 35a.

3. After the hearing, the government submitted the consent-to-search form for fingerprint and handwriting analysis. While petitioner's fingerprints were not found on the form, a handwriting expert concluded that the signature on the form was indeed petitioner's. Pet App. 4a. On March 14, 2005, the government filed a motion to reconsider the suppression order, or alternatively to supplement the suppression hearing with testimony from its handwriting expert. The district court denied the motion for reconsideration, but requested a response from petitioner regarding the motion to supplement. Petitioner responded that the additional testimony would not relate to the issue of consent and that it would be prejudicial to reopen the hearing unless the court appointed an independent handwriting expert to review the evidence. The court granted the government's motion to supplement the suppression hearing with the additional testimony of a handwriting expert, and it granted petitioner leave to hire his own expert. Thereafter, the court conducted hearings to consider the testimony of both handwriting experts. *Id.* at 5a.

At the supplemental hearing, the government's handwriting expert testified that "he had concluded with his 'highest degree of confidence' that [petitioner] had signed the questioned document" and that "all dissimilarities between the questioned and known signatures were within the expected range of variation." Pet. App. 5a-6a.

The defense expert testified that several inconsistencies and "voids" within the pen strokes could indicate forgery. She explained, however, that she had not examined the document before it had been treated for fingerprint analysis, and that the chemical treatment or even a faulty pen could have resulted in the inconsistencies

Pet. App. 5a. She concluded that, after comparing the questioned signature with petitioner's known signatures, there were "indications" that petitioner may have signed the form, which she characterized as a "very weak opinion of authorship." *Ibid.*; see Gov't C A. Br. 9 (quoting the defense expert's opinion that there were "'no fundamental differences between the signature on the consent to search form' and the known signatures for [petitioner]").

The district court vacated its prior ruling and denied petitioner's motion to suppress. Pet. App. 39a-49a. The court stated that it afforded little weight to the government expert's conclusion that petitioner had signed the consent form. Rather, the court explained that both experts' testimony was useful in aiding the court's own evaluation of the signatures. *Id* at 40a; see *id* at 6a. The court stated that, after examining the questioned and known signatures, it had concluded by a preponderance of the evidence that petitioner had signed the consent-to-search form and that petitioner's contrary testimony was untruthful. The court accordingly found that Agent Glynn's testimony regarding the search was more likely true than not, and that petitioner had consented to the search. *Id* at 47a-48a Upon petitioner's motion, the court held another hearing to consider petitioner's additional evidence on the search, but the court ultimately denied petitioner's motion to reconsider its denial of the motion to suppress. *Id.* at 6a.

4. In August 2006, petitioner proceeded to trial, but a mistrial was declared when the jury was unable to reach a verdict. Pet. App. 6a-7a. Petitioner's retrial in November 2006 resulted in his conviction. He was sentenced to 25 years of imprisonment, to be followed by five years of supervised release *Id* at 7a-8a.

5 The court of appeals affirmed. Pet App. 1a-22a. The court rejected petitioner's argument that the district court erred in reopening the suppression hearing because the government could have subjected the document to handwriting analysis before the first hearing. *Id* at 9a-14a. Noting that it generally gave wide latitude to a district court's decision to reopen suppression hearings to consider newly obtained evidence, the court of appeals was unpersuaded by petitioner's argument that it should not do so when the party could have presented the evidence at the original hearing. The court pointed to the strong societal interest in the admission of all relevant evidence and noted that a defendant is only entitled to suppress evidence obtained in violation of the Constitution. The court adhered to circuit precedent holding that a district court remains free throughout trial to reconsider its previous order suppressing evidence, even absent government justification for such a request. *Id.* at 9a-10a. The court acknowledged that several circuits have adopted rules requiring the government to justify the reconsideration or reopening of suppression hearings, and it agreed that concerns about "fairness" and "piecemeal litigation" were valid. *Id* at 10a-12a. Nevertheless, the court of appeals concluded that a "more flexible approach" best protected society's interest in ensuring that all constitutionally obtained evidence is admitted and considered. *Id* at 12a At the same time, the court stressed, a district court remains "free to refuse to reopen the suppression hearing or to decline to consider the government's evidence if the government is wasting judicial resources or proceeding in a way that is unfair to the defendant." *Ibid*

The court of appeals found no abuse of the district court's discretion in this case. The court observed that

the handwriting comparison testimony "had a direct bearing on [petitioner's] credibility" because, if petitioner had signed the consent form, he had perjured himself at the previous hearing. Pet. App. 13a. The court found that "[t]his information would assist the district court in determining whose version of the search to believe, resulting in a more accurate ruling on the motion to suppress." *Ibid.* The court of appeals found no evidence that the government "was engaged in a deliberate strategy to proceed in a piecemeal fashion or otherwise waste judicial resources." *Ibid.* Instead, the court noted that the authenticity of petitioner's signature on the consent form was not clearly at issue until the first suppression hearing, when the district court expressed doubts about whether it was genuine. *Ibid.* Finally, the court of appeals stated that petitioner had not shown that he suffered any prejudice from the reopening of the suppression hearing because he had been allowed to call his own handwriting expert, and his counsel had extensively cross-examined the government's witness. *Id.* at 13a-14a.[1]

ARGUMENT

Petitioner contends (Pet. 9-23) that this Court should grant review to resolve a conflict among the courts of appeals over whether a litigant seeking to reopen a suppression hearing to permit it to introduce additional evi-

[1] The court also rejected petitioner's claim that the government's use of expert handwriting testimony did not meet the requirements of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), governing the admissibility of an expert witness's testimony (Pet. App. 14a-17a), as well as his challenge to various evidentiary rulings by the district court (*id.* at 17a-22a). Petitioner does not renew those challenges in this Court.

dence must justify its failure to submit such evidence at the original hearing. The courts of appeals all agree, however, that the decision to reopen a suppression hearing is left to the discretion of the district court, and any circuit conflict on this point is not of sufficient importance to warrant this Court's plenary review. Furthermore, this case would present a poor vehicle to resolve any such conflict because even under a justification requirement, the government's request to reopen the suppression hearing in this case was justified.

1. Petitioner contends (Pet. 11-15) that the court of appeals' decision in this case, which leaves the ultimate decision whether or not to reopen a suppression hearing to the sound discretion of the district court, conflicts with decisions of five other circuits To the contrary, there is no direct conflict among the courts of appeals. As an initial matter, *all* of the courts of appeals that have considered the issue agree that the decision to reopen a suppression hearing is left to the sound discretion of the district court and will not be disturbed on appeal absent an abuse of that discretion. See, *e g* , *In re Terrorist Bombings of United States Embassies in E Africa*, 552 F.3d 177, 196 (2d Cir. 2008), cert. denied, 129 S. Ct. 2765, 129 S. Ct. 2778 (2009), and No. 09-6231 (Jan. 11, 2010) (*In re Terrorist Bombings*); *United States* v. *Gill*, 513 F.3d 836, 846 (8th Cir.), cert denied, 129 S. Ct 750 (2008); *United States* v. *Simms*, 385 F.3d 1347, 1356 (11th Cir. 2004), cert denied, 544 U.S. 988 (2005); *United States* v *Carter*, 374 F.3d 399, 405 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005); *United States* v. *Coward*, 296 F.3d 176, 180 (3d Cir. 2002); *United States* v *Jordan*, 291 F.3d 1091, 1100 (9th Cir. 2002), vacated on other grounds, 543 U.S. 1103 (2005); *United States* v. *Wiseman*, 172 F.3d 1196, 1207-

1208 (10th Cir.), cert denied, 528 U S 889 (1999); *United States* v. *Dickerson*, 166 F 3d 667, 678 (4th Cir. 1999), rev'd on other grounds, 530 U.S. 428 (2000); *United States* v. *Hassan*, 83 F.3d 693, 696 (5th Cir. 1996). Moreover, courts of appeals agree that a number of factors may guide the district court's exercise of its discretion in deciding whether to reopen a suppression hearing See *In re Terrorist Bombings*, 552 F.3d at 196-197, *Carter*, 374 F.3d at 405-406; *Coward*, 296 F.3d at 181.

As the court of appeals correctly recognized in this case (Pet. App. 12a), a lack of justification is certainly one of those factors a district court may consider. See *In re Terrorist Bombings*, 552 F.3d at 196-197, *Hassan*, 83 F.3d at 696. Two of the cases petitioner cites as constituting part of the supposed circuit conflict did no more than recognize that a district court may exercise its discretion in this way. See *Carter*, 374 F.3d at 406 (holding that the district court did not abuse its discretion by denying the defendant's motion to reopen a suppression hearing without explaining why he failed to present the evidence at the initial hearing); *Dickerson*, 166 F.3d at 679 ("[T]he movant must provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress *before we will determine that a district court abused its discretion* in refusing to reconsider its suppression ruling.") (emphasis added); see also *ibid* ("[T]hat evidence was available to the movant prior to the suppression hearing does not, as a matter of law, defeat a motion for reconsideration in a criminal case "). These cases are therefore entirely consistent with the court of appeals' reasoning in this case.

Nor do the other cases cited by petitioner conflict with the decision of the court of appeals here. The Third Circuit in *United States* v *Kithcart*, 218 F.3d 213 (2000), considered the circumstances under which a district court may reopen a suppression hearing to receive additional proof *on remand* from an appellate court that vacated its prior suppression order. *Id* at 219-220. Analogizing the receipt of additional evidence on remand to the reopening of the government's case in chief after resting, the court stressed that "the district court's primary focus should be on whether the party opposing reopening would be prejudiced if reopening is permitted." *Id* at 220. As the Third Circuit later explained, "[a] critical factor in evaluating prejudice is the timing of the motion to reopen." *Coward*, 296 F.3d at 181. Because the Third Circuit's rule depends on the prejudice inherent in reopening a suppression hearing long after the original suppression has been ordered and other proceedings have taken place in the case, it has no application (and thus no conflict with) a case such as this one, in which a party moves to reopen less than two weeks after the suppression order, when the district court has never ceded its jurisdiction over the case [2]

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[2] The focus on the potential prejudice that would be suffered by the non-moving party also drove this Court's decision in *United States* v *Bayer*, 331 U S. 532 (1947) In *Bayer*, this Court affirmed a district court's refusal to allow a defendant to reopen the trial record to offer new evidence four hours into jury deliberations The Court ultimately concluded that the prejudice to the government and the distorted significance that would have been attributed to the evidence in the jury's eyes if the new evidence were admitted so late in the proceedings justified the district court's refusal Such circumstances are readily distinguishable from this case, and petitioner therefore is wrong (Pet 21-22) that the decision below conflicts with *Bayer*

For similar reasons, petitioner is incorrect that the court of appeals' reasoning conflicts with the D.C. Circuit's decision in *McRae* v *United States*, 420 F.2d 1283 (1969). Decided at a time when the government did not have authority to appeal a pretrial order suppressing evidence, *McRae* involved the unusual circumstances in which one district judge reconsidered a suppression order entered by a different district judge in the same case. See *id.* at 1285. After conducting a suppression hearing, the first district judge granted the defendant's motion to suppress and denied two motions to reconsider from the government. *Ibid* When trial began before another judge, the judge reconsidered the issues and ruled that the previously suppressed evidence would be admissible. In reversing, the court of appeals held that in those particular circumstances, the government "was obligated to advance stronger justification for relitigating the issue at trial." *Id* at 1288 The court then took pains to emphasize that it was "not attempt-[ing] to establish detailed standards governing when * * the Government may request a new hearing before the trial judge " *Id* at 1289; see *Hassan*, 83 F 3d at 696 n 3 (noting that it had "limited *McRae* to situations in which a judge at trial reverses a pretrial suppression ruling entered by a *different* judge"). *McRae* therefore did not purport to establish a bright-line rule, but rather confined its holding to the unique circumstances of that case, which in no way resemble the facts here.

Finally, the court of appeals' holding does not conflict with the Eleventh Circuit's decision in *United States* v *Thompson*, 710 F.2d 1500 (1983), cert. denied, 464 U.S. 1050 (1984). In *Thompson*, the district court denied the government's motion for reconsideration of a suppression order that pressed a legal argument that

the government had expressly *conceded* at the suppression hearing. *Id.* at 1504. In light of that concession and the government's lack of justification for failing to assert or develop the opposite argument at the original suppression hearing, the court of appeals agreed that the government had waived its right to assert that argument on appeal. *Ibid.*[3] *Thompson* therefore did not purport to address the circumstances under which a district court may reopen a suppression hearing to receive additional evidence.

In short, petitioner has not shown that the court of appeals' decision directly conflicts with any decision of this court or another court of appeals.[4]

2. Furthermore, the court of appeals was correct in deciding that a bright-line justification requirement is an unwarranted limit on the district court's discretion to reopen suppression hearings. As the court of appeals noted (Pet. App. 11a-13a), the stated justification for such a "good cause" bright-line rule is the interest in promoting judicial economy and preventing "piecemeal litigation." See *Dickerson*, 166 F.3d at 679. A related concern expressed by petitioner (Pet. 16-21) is that liti-

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[3] In so holding, *Thompson* relied on this Court's decision in *Steagald v. United States*, 451 U.S. 204, 209 (1981), which shows why petitioner is wrong in asserting (Pet. 22) that the court of appeals' decision conflicts with *Steagald*. Like *Thompson*, *Steagald* involved limitations on a party's right to assert an argument on appeal that was not argued —or was in fact conceded—in the lower courts. 451 U.S. at 211. Also like *Thompson*, *Steagald* does not address the question of a district court's discretion to reopen its own suppression hearing.

[4] Nor is petitioner correct in asserting (Pet. 21) that the decision below conflicts with various federal rules. As petitioner concedes, no federal rule addresses the decision to reopen suppression hearings, so the rules he cites do not conflict with the court of appeals' decision.

gants may attempt to "game the system" by presenting evidence in increments.

But reopening the proceedings does not necessarily unduly extend the proceedings. There may be other motions pending before the court requiring resolution that independently prolong the pretrial period. In any event, a totality of the circumstances approach allows the district court to take into account whether granting a motion to reopen would unnecessarily delay the case. As discussed (p 10, *supra*), courts of appeals have not hesitated to affirm a district court's refusal to reopen suppression hearings based on the moving party's lack of diligence or preparation. See *Carter*, 374 F.3d at 406; *Dickerson*, 166 F.3d at 679; see also *Hassan*, 83 F.3d at 696 (finding no abuse of discretion by the district court in denying government's motion to reopen suppression hearing because it had "ample time to prepare for the previous hearing") (citation omitted). Accordingly, a party has every incentive to introduce at the original suppression hearing all the evidence available to it that it believes necessary to prevail: failure to do so not only invites an adverse ruling, but also makes it exceedingly difficult for a party to prevail on any subsequent motion to reopen the proceedings.

On the other hand, as this Court and other courts have recognized, allowing a district court broad discretion to correct its own errors may likely serve to enhance judicial economy by conserving appellate resources. See *United States* v *Ibarra*, 502 U.S. 1, 5 (1991) (per curiam) (noting that motions for reconsideration provide district courts an opportunity to correct their own errors and "prevent[] unnecessary burdens being placed on the court of appeals"); *United States* v. *Healy*, 376 U.S. 75, 80 (1964) ("Of course speedy disposi-

tion of criminal cases is desirable, but to deprive the Government of the opportunity to petition a lower court for the correction of errors might, in some circumstances, actually prolong the process of litigation."), *United States* v. *Rabb*, 752 F.2d 1320, 1323 (9th Cir. 1984) (noting that the totality of the circumstances approach "enables a district court to correct its own errors without the use of appellate resources"), cert. denied, 471 U.S. 1019 (1985), abrogated on other grounds, *Bourjaily* v. *United States*, 483 U.S. 171 (1987). Furthermore, as the court of appeals recognized, such an approach serves society's interest in admitting all relevant evidence in light of the fact that "a defendant is entitled to suppression only in cases of constitutional violations." Pet. App. 10a, 12a; accord *Rabb*, 752 F.2d at 1323.

3. Finally, review is unwarranted because even if there were a conflict among the courts of appeals on this question, this case would present a poor vehicle to resolve that conflict. That is because, contrary to petitioner's assertion (Pet. 18), he would not be entitled to relief under the bright-line rule he urges this Court to adopt As the court of appeals correctly observed, the government's request to reopen the suppression hearing was justified because the authenticity of petitioner's signature was not at issue until the suppression hearing. Pet. App. 13a.

Petitioner vaguely asserted in his initial motion to suppress that the cocaine in his tractor-trailer was obtained in violation of the Fourth Amendment. See Mot to Suppress (Oct. 3, 2004). In response, the government asserted that petitioner had consented to the search of his tractor-trailer The district court permitted petitioner to amend his motion to suppress, and he then spe-

cifically asserted that he did not consent to the search. See Mot. to Dismiss 14-15 (Jan. 12, 2005).

As is typically the case, the government reasonably expected that its production of the signed consent-to-search form at the suppression hearing would suffice to rebut petitioner's claim of lack of consent. It had no reason to think petitioner would claim that someone else had signed the form. Accordingly, when the district court granted petitioner's motion to suppress, partly on the ground that the signature on the consent-to-search form appeared different from petitioner's known signatures, the government acted reasonably in expeditiously submitting the signature to handwriting analysis. Then, after receiving the results, it was fully justified in seeking to reopen the hearing to allow for expert testimony on this score to ensure the accuracy of the district court's decision.

A contrary holding would effectively require the government to submit every signed consent-to-search form to handwriting and fingerprint analysis before a suppression hearing, in order to preemptively refute a possible forgery claim that might be raised for the first time at that hearing. Such a waste of resources should not be required by the judicially created rule petitioner advocates before this Court. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-293

In the Supreme Court of the United States

MODESTO OZUNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition demonstrated that the courts of appeals are deeply divided concerning whether a party moving to reopen a suppression hearing to introduce additional evidence must provide justification for its failure to introduce that evidence at the initial hearing (Pet. 11–15); that the question presented is recurring and of substantial importance (*id.* at 15–18); and that the Seventh Circuit's decision is erroneous (*id.* at 19–23). None of the government's contrary arguments justify denial of the petition.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The government asserts that "there is no direct conflict among the courts of appeals." Opp. 9. But as the government admits, the Seventh Circuit expressly "acknowledged that several circuits have adopted rules requiring the government to justify the reconsideration or reopening of suppression hearings." *Id.* at 7; see Pet. App. 11a ("Several of our sister circuits have * * * adopted rules requiring the government to justify reconsidering, reopening, or supplementing suppression hearings"). The court below is far from alone in acknowledging this deep circuit split. The Second Circuit has recognized that courts of appeals have taken "two approaches" to resolving motions to reopen suppression hearings (*United States* v. *Bayless*, 201 F.3d 116, 131 (2d Cir. 2000)), while the Ninth Circuit has squarely "reject[ed] [a] 'justification' requirement" adopted by other circuits. *United States* v. *Rabb*, 752 F.2d 1320, 1323 (9th Cir. 1984), abrogated on other grounds by *Bourjaily* v. *United States*, 483 U.S. 171 (1987)); see also Pet. 12 (citing additional cases acknowledging circuit split).

The government attempts to reconcile the Seventh Circuit's decision with the five circuits that have imposed a justification requirement by asserting that "*all* of the courts of appeals that have considered the issue agree that the decision to reopen a suppression hearing is left to the sound discretion of the district court." Opp. 9. While the courts of appeals agree that rulings on motions to reopen should be reviewed for abuse of discretion, that does not reconcile the circuits' disparate conclusions concerning what constitutes an abuse of discretion. The Seventh Circuit held below that district courts may grant motions to reopen under a "'totality of the circumstances'" approach without requiring the moving party to demonstrate justification. Pet. App. 12a. By contrast, courts adopting the bright-line rule have held that "to properly exercise its discretion the district court *must* evaluate [the moving party's] explanation and determine if it is both reasonable, and adequate to explain why the [moving party] initially failed to introduce evidence that may have been essential to meeting its burden of proof." *United States* v. *Kithcart*, 218 F.3d 213, 220 (3d Cir. 2000). Thus, contrary to the Seventh Circuit's approach, the bright-line rule adopted by the majority of circuits makes it is a *per se* abuse of discretion for a district court to reopen a suppression hearing to admit evidence that was available at the time of the initial hearing without requiring the moving party to justify its failure to introduce that evidence at the initial hearing.

The government also attempts to distinguish cases adopting the bright-line rule on their facts. First, the government claims that "[t]wo of the cases petitioner cites as constituting part of the supposed circuit conflict did no more than recognize that a dis-

trict court may exercise its discretion" by denying reopening absent justification. Opp. 10 (citing *United States* v. *Dickerson*, 166 F.3d 667 (4th Cir. 1999), rev'd on other grounds, 530 U.S. 428 (2000); *United States* v. *Carter*, 374 F.3d 399 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005)). In fact, the Fourth Circuit held in *Dickerson* that "when the evidence forming the basis for a party's motion for reconsideration was in the movant's possession at the time of the initial hearing, * * * the movant *must* provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress." 166 F.3d at 679 (emphasis added). Similarly, the Sixth Circuit held in *Carter* that "'to properly exercise its discretion the district court *must* evaluate'" the moving party's "'explanation for failure to present the evidence'" at the initial hearing. 374 F.3d at 405 (emphasis added). Thus, the Fourth and Sixth Circuits did not hold merely that district courts may exercise their discretion to deny reopening absent justification. Rather, contrary to the Seventh Circuit, the Fourth and Sixth Circuits held that district courts must deny reopening absent justification.

Second, the government claims that the Third Circuit's decision in *Kithcart* "depends on the prejudice inherent in reopening a suppression hearing long after the original suppression has been ordered." Opp. 11. But in holding that the district court erred in reopening a suppression hearing to allow the government to introduce additional evidence, *Kithcart* did not so much as mention the delay between the two suppression hearings. Instead, the court based its decision on the lack of any justification for the government's failure to introduce the additional evidence at the initial hearing. Thus, the Third Cir-

cuit required the district judge to resolve the parties' dispute based "solely upon the evidence that was presented or offered at the original suppression hearing" because "the government still has not offered any explanation for its failure to introduce additional evidence at the original suppression hearing." *Kithcart*, 218 F.3d at 221; see *United States* v. *Coward*, 296 F.3d 176, 181 (3d Cir. 2002) (*Kithcart* "placed emphasis on the need for an adequate explanation of the failure to present the relevant evidence earlier").

Third, the government seeks to distinguish *United States* v. *Thompson*, 710 F.2d 1500 (11th Cir. 1983), because in that case the government conceded at the initial suppression hearing the legal argument that it later sought to press at a second hearing. Opp. 12–13. That distinction is beside the point. The Eleventh Circuit held that the government waived its right to reconsideration not simply because it had conceded the legal argument supporting its motion, but because it "offered no justification for its failure to raise and develop the issue at the [initial] suppression hearing." *Thompson*, 710 F.2d at 1504; accord *United States* v. *Villabona-Garnica*, 63 F.3d 1051, 1055 (11th Cir. 1995).

Finally, the government claims that in *McRae* v. *United States*, 420 F.2d 1283 (D.C. Cir. 1969), the D.C. Circuit "confined its holding" to "the unusual circumstances in which one district judge reconsidered a suppression order entered by a different district judge." Opp. 12. The D.C. Circuit did no such thing. To the contrary, in a subsequent case where the government sought reconsideration of the *same* district judge's suppression order, the D.C. Circuit cited *McRae* in holding that "[t]he government cannot relitigate the issues resolved by a suppression

order without advancing some justification for its failure to develop those issues fully at the initial hearing." *United States* v. *Greely*, 425 F.2d 592, 593 (D.C. Cir. 1970). Thus, contrary to the government's position, the Seventh Circuit was correct in citing *McRae* as "requiring the government to justify reconsidering, reopening, or supplementing suppression hearings." Pet. App. 11a.

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

The government asserts that this case presents a "poor vehicle" to resolve the question presented because petitioner "would not be entitled to relief under the bright-line rule." Opp. 15. In doing so, the government claims that the Seventh Circuit held that "the government's request to reopen the suppression hearing was justified because the authenticity of petitioner's signature was not at issue until the suppression hearing." *Id.* That is incorrect.

In holding that the district court did not abuse its discretion by reopening the suppression hearing, the Seventh Circuit noted that "[i]t does not appear" that the authenticity of the signature on the consent-to-search form "was clearly at issue until the first suppression hearing." Pet. App. 13a. The Seventh Circuit did not, however, suggest that its speculation about whether the authenticity of the signature on the consent-to-search form was "at issue" before the initial suppression hearing constituted an alternative holding that would suffice to provide justification for reopening under the bright-line rule. Moreover, as the government concedes, petitioner "specifically asserted that he did not consent to the search" in his motion to suppress filed *before* the initial hearing. Opp. 15–16; see C.A. App., Tab 21 at 14–15.

Thus, contrary to the government's assertion (at 16), it had reason to believe that the authenticity of the signature on the consent-to-search form would be in dispute before the initial suppression hearing. In any event, the government should present any claimed justification for its failure to introduce handwriting analysis at the initial hearing in the district court to allow that court to resolve any such claim under the bright-line rule.

III. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT.

The petition explains that the bright-line rule adopted by the majority of circuits promotes predictability, finality, and the prompt adjudication of motions to suppress by placing litigants on notice that they must introduce all relevant, available evidence at the initial hearing. Pet. 19–23. The government's defense of the Seventh Circuit's "totality of the circumstances" approach does not justify rejecting the bright-line rule.

The government first claims that "reopening the proceedings does not necessarily unduly extend the proceedings." Opp. 14. While that may be true, it is indisputable that reopening a suppression hearing to introduce additional evidence at a successive hearing will generally cause delay, as the facts of this case amply demonstrate. Pet. 17–18. The government next claims that "a party has every incentive to introduce at the original suppression hearing all the evidence available to it." Opp. 14. The sheer number of cases addressing disappointed litigants' motions to reopen suppression hearings suggests, however, that there is not incentive enough. Pet. 15–16 & n.2. Finally, the government claims that "allowing a district court broad discretion to correct its own errors may

likely serve to enhance judicial economy by conserving appellate resources." Opp. 14. In fact, the bright-line rule provides district courts with discretion to reopen suppression hearings upon a showing of justification. Moreover, the district court does not need justification to correct "its own errors"; justification is required only when the movant seeks to reopen a suppression hearing to introduce additional evidence that was available at the time of the initial hearing. Therefore, the totality of the circumstances approach adopted by the Seventh Circuit will not conserve appellate resources.

CONCLUSION

The petition for a writ of certiorari should be granted.

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